

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904

No. 121

PAUL HEYMAN AND JULES HEYMAN, PARTNERS, DOING
BUSINESS UNDER THE FIRM NAME AND STYLE OF
PAUL HEYMAN, AND THE UNITED STATES FIRE
AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

W. F. HAYS, COUNTY CLERK OF HAMILTON COUNTY,
TENNESSEE; J. PARRS WOLLEY, STATE INSURANCE
AGENT OF THE STATE OF TENNESSEE AND W. B.
DONOR, SHERIFF OF HAMILTON COUNTY, DEFENDANTS
IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE

FILED MARCH 9, 1905.

(23,572)

(23,572)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 474.

PAUL HEYMAN AND JULES HEYMAN, PARTNERS, DOING
BUSINESS UNDER THE FIRM NAME AND STYLE OF
PAUL HEYMAN, AND THE UNITED STATES FIDELITY
AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

W. P. HAYS, COUNTY CLERK OF HAMILTON COUNTY,
TENNESSEE; J. PARKS WORLEY, STATE REVENUE
AGENT OF THE STATE OF TENNESSEE, AND SAM A.
CONNOR, SHERIFF OF HAMILTON COUNTY, TEN-
NESSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

INDEX.

	Original.	Print
Caption	1	1
Transcript from chancery court of Hamilton county.....	2	1
Caption of court.....	2	1
Style of suit.....	2	1
Prosecution bond	2	1
Original bill	2	2
Injunction bond	12	9
Injunction to Hamilton County for W. P. Hays, clerk.....	13	10
Subpoena to Hamilton County for W. P. Hays, clerk.....	13	10
Injunction to coroner of Hamilton county.....	14	10
Subpoena to coroner of Hamilton county.....	14	10
Injunction to Sullivan County for J. Parks Worley.....	14	10
Subpoena to Sullivan County for J. Parks Worley.....	14	11

	Original. Print	
Demurrer of all defendants.....	15	11
Final decree	15	12
Rule docket	18	13
Execution docket	19	14
Certificate of clerk and master.....	20	15
Brief on behalf of appellants.....	22	15
Brief for appellees.....	45	28
Decree	111	63
Opinion	113	64
Clerk's certificate	115	65
Petition for writ of error.....	116	66
Order allowing writ of error.....	125	70
Writ of error.....	127	71
Assignment of errors.....	129	72
Prayer for reversal.....	132	74
Bond on writ of error.....	133	74
Bond on writ of error.....	135	75
Bond on injunction.....	137	76
Citation and service.....	138	77
Citation and service.....	130	78

1 No. 27.

Transcript.

Chancery Court of Hamilton County.

Solicitors:

Littleton, Littleton & Littleton.
Pritchard, Allison & Lynch.
Williams & Lancaster.

13241.

Sam M. Chambliss.
John H. Early.

Sam M. Chambliss, Surety.

Parties:

Paul Heymann et al. vs. W. P. Hays, Clerk, et al.

Filed August 24, 1912. S. E. Cleage, Clerk.

2 At a special term of the Chancery Court of Hamilton County, Tennessee, begun and held at the Court House in the City of Chattanooga, said county and State, on the second Monday it being the 8th day of July, 1912, present and presiding the Hon. T. M. McConnell, Chancellor, in and for the Third Chancery Division of said State, the following proceedings were had, viz:

Style of Suit.

No. 13241.

PAUL HEYMAN et al.

vs.

W. P. HAYS, Clerk.

Prosecution Bond.

Filed 12th Day of June, 1912.

We hereby acknowledge and bind ourselves for the prosecution of the above suit and payment of such costs as may be awarded on the final hearing thereof.

THE UNITED STATES FIDELITY &
GUARANTY CO., [SEAL.]
By ROBERT PRITCHARD, At'y in Fact.

(Attest:)

JNO. T. OWEN.

Original Injunction Bond.

Filed 12th Day of June, 1912.

In the Chancery Court of Hamilton County, Tennessee.

PAUL HEYMANN and JULES HEYMANN, Citizens and Residents of Hamilton County, Tennessee, Partners, Doing Business under the Name and Style of Paul Heymann, Complainants,

versus

W. P. HAYS, Clerk of the County Court of Hamilton County, Tennessee, a Citizen and Resident of Hamilton County, Tennessee; J. Parks Worley, Revenue Agent for the State of Tennessee, etc., a Citizen and Resident of Sullivan County, Tennessee; and
3 Sam A. Conner, Sheriff of Hamilton County, Tennessee, a Citizen and Resident of Hamilton County, Tennessee, Defendants.

To the Honorable T. M. McConnell, Chancellor, etc., Presiding at Chattanooga, Hamilton County, Tennessee:

1.

That on January 1, 1912, complainants were, and since, continuously have been, and still are engaged in interstate business exclusively, as follows:

At said date they lawfully owned and had on their possession a large stock of spiritous liquors. The laws of the State of Tennessee, recently enacted regulating domestic traffic in intoxicating liquors are such that complainants cannot profitably conduct that character of business. For this reason complainants have, since first day of January, 1912, confined and still confine their operations exclusively to the sale of said liquors to non residents of the State of Tennessee, for shipment out of and beyond the limits of the State of Tennessee and into other states for delivery there and have not, since said date, sold or offered for sale or handled for sale, nor do they desire or intend to sell or offer for sale any liquors for any purpose, within the State of Tennessee. They have resorted to no subterfuge or evasion of the laws of the State of Tennessee regulating or prohibiting domestic traffic in intoxicating liquors and they have in no way engaged in such domestic traffic. The manner in which complainants have conducted their business since January 1, 1912, and still conduct their business is as follows, and not otherwise: Complainants' said stock of liquors is kept in their warehouse at Chattanooga, Tennessee. Complainants solicit and receive orders by mail from citizens and residents of other states for shipment and delivery in such other states of said liquors, and complainants neither solicit orders in Tennessee nor solicit nor receive orders for shipment and delivery at any points in Tennessee, nor make any such shipments or deliveries. Upon receiving orders from citizens and residents of other states for the shipment of liquors from the

State of Tennessee into such other and different states and delivery there, complainants manifest their acceptance of such orders by delivery of said liquors from their said place of business at
 4 Chattanooga, Tennessee, to railroads engaged in interstate traffic for continuous transportation and delivery only to points beyond the State of Tennessee, and to said purchasers; which said act of delivery closes the contract of sale; and complainants collect the price of the goods sold by checks and money orders mailed to them from said foreign states, either at the time the order is received, or after said liquors are received by said purchasers.

II.

Complainants have complied with all the revenue laws of the United States and of the State of Tennessee, applicable to them. They have paid the Federal taxes assessed against them as liquor dealers and hold Federal license to carry on business as such. They have paid the State, county and city taxes upon their property and the ad valorem tax based upon the value of their stock of goods, commonly known as "Merchants' Tax" and complainants are advised, believe and charge they are subject to no further assessment for taxation. And complainants have paid all privilege taxes claimed by defendants, including the privilege taxes provided for in Chapter 479, Acts of 1909, up until the said first day of January, 1912. No privilege tax is claimed by the State on business done by complainants prior to said date.

III.

The Act of the General Assembly of the State of Tennessee, 1909, Chapter 479, Section 4, provides among other things, as follows: "That each vocation, occupation and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the County Court Clerk as provided by law for the collection of revenue."

The act then lists numerous occupations, etc., and fixes the rate of taxation against them including liquor dealers in the following language:

"Wholesale and in addition taxed as other merchants \$500.

5 "Retail, taxed as other merchants and in addition, shall pay as follows:

"In cities, taxing districts, or towns of 6,000 inhabitants or over, each per annum \$500.00.

"Persons selling beer or any quantity of liquors on steamboats, flat boats or any other vessel or water craft, or from railroad cars, shall pay a tax, each in lieu of all other taxes to be paid in any county they may elect, per annum \$500.00.

"Persons selling liquors in quantities of one quart or more except manufacturers selling to dealers in original packages of not less than five gallons, are wholesale dealers and persons selling smaller quantities than five gallons are retail dealers; and the tax on liquor

dealers applies to all drug stores, except in uses of wine for sacramental purposes and alcohol for domestic purposes. No producer of grape wine, where they raise and make the wine themselves, shall pay any privilege tax for selling the same.

"Provided: They shall not sell in quantities of less than one and — half (1½) gallons.

"Liquor dealers are defined as every person, company or firm selling spiritous, vinous or malt liquors, beer or ale, or intoxicating bitters or any medicated or adulterated cider, or any social club or association, incorporated or otherwise, which handled such liquors for sale. The procuring of United States Revenue license to wholesale or retail liquor dealers shall be taken as prima facie evidence that the parties are in the wholesale or retail liquor business, and are subject to the State and County taxes, unless established by proof that they are not so engaged. Upon any Clerk's receiving knowledge of such internal revenue license, he shall have a right to collect the taxes by distress warrant.

"Provided: That nothing in this Act shall authorize or legalize the sale of liquor."

Section 16 of said Act provides:

"It is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the privilege tax prescribed for the exercise of the same, and all parties so offending shall be liable to a fine of not less than \$10.00 nor more than \$50.00 for each day such privilege is exercised without license; but this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce."

Under other statutory provisions of Tennessee, the County of Hamilton and City of Chattanooga are each authorized to impose privilege taxes on occupations and businesses taxed by the State as such to an amount not exceeding that prescribed by the State on such business or occupation, and said County and City have under such authority imposed privilege taxes on the business of liquor dealers to the full amount allowed by law. The county and city have no power to tax a business as a privilege not so taxed by the State.

IV.

Complainants are advised, believe and charge that the said Act of 1909, Chapter 479, relating to privilege taxes, has no application to complainants and that complainants are not subject to its provisions; that the clear intent meaning and purpose of said statute is to prescribe a privilege tax against persons, firms and corporations engaged in selling spiritous, vinous and malt liquors, etc. within the State of Tennessee, and not against those engaged exclusively in interstate commerce and business. As an indication of this Legislative intent, Section 16 of said Act provides that the penalties and inhibitions therein prescribed are not applicable to persons, firms or corporations engaged in interstate commerce. Complainants are advised, believe and charge that, if said statute is susceptible to the construction that it imposes a privilege tax upon persons, firms and corporations engaged like complainants in interstate commerce, ex-

clusively, the statute to that extent violates Article One, Section 8, sub section 3 of the Constitution of the United States, as follows:

"Congress shall have the power to regulate commerce with foreign nations, among the several states and among the Indian tribes." And complainants plead and rely upon said provision of the constitution.

7

V.

Complainants now show the Court that defendants, J. Parks Worley and W. P. Hays have recently conceived the idea, that, although complainants are engaged exclusively in interstate commerce, as hereonbefore shown, that they may be assessed with said county and state privilege tax for the present year, 1912, and subjected to payment thereof; and that said J. Parks Worley and W. P. Hays have the power and right to assess complainants. And said defendants, proceeding under color of said Act of 1909, Chapter 479, but without warrant or authority of law and in violation of said Article One, Section 8, Sub section 3, of the Constitution of the United States and of the laws passed pursuant thereto, ex parte, and without giving complainants an opportunity to be heard, have illegally attempted to assess complainants with said State privilege tax for the year 1912, beginning January 1st, amounting to \$500.00, together with costs, penalties, etc. provided by said statute to be paid by persons engaged in domestic traffic in spiritous liquors, and have likewise illegally attempted to assess complainants with the privilege tax provided by and for the County, to be paid by *reasons* engaged in domestic traffic in spiritous liquors, in a like sum, with penalties, costs, fees, etc., by and under color of said Act of 1909; and said Hays thereupon, ex parte and without giving complainants an opportunity to be heard, illegally, and without warrant or authority of law, and in violation of said Article one, Section 8, sub section 3, of the Constitution of the United States and of the laws passed pursuant thereto, issued a distress warrant against complainants, calling on its face for twice the sum of said State tax, together with costs penalties, fees, etc. and also twice the sum of said County tax, together with costs, fees, penalties, etc., and placed the same in the hands of defendant, Sam A. Conner, Sheriff of Hamilton County, Tennessee, for execution and collection.

VI.

Said defendant, Sa. A. Conner, Sheriff of Hamilton County, Tennessee, having in his hands said void and illegally issued
8 distress warrant, authorizing the seizure of the property of complainants in twice said sum, claimed for State and County privilege taxes, together with costs, penalties fees, etc. on the 1st day of June, 1912, came to complainants' place of business, and then and there threatened to levy said distress warrant upon complainants' stock of goods and wares; and, in violation of complainants' rights under said section of the Constitution, carrying out said threat, was about to immediately seize and sell their property. A seizure of complainants' property being imminent, and there being

no other legal means of protecting the same, as to the tax claimed for the State than by payment of said sum illegally claimed for said privilege tax, costs, penalties, fees etc. and to save their property from levy, seizure and sale, and under duress of property, complainants paid over to said Sam A. Conner, Sheriff of Hamilton County, Tennessee, on said day, under protest, as and for said wrongfully claimed State tax, the sum of \$500.00, together with the penalty of \$75.00 Sheriff's fees, \$15.00; costs on distress warrant, \$2.25; and Clerk's fees, \$1.50; totaling \$593.75; representing the full sum claimed by said defendants as privilege taxes for the State of Tennessee for the year beginning January 1st, 1912; together with costs, fees, penalties, etc. Said defendant, Sam. A. Connor, at that time executed a receipt, reciting the payment of said State tax, penalties, costs, fees, etc. under protest, which is hereto attached, marked exhibit "A" and made a part hereof.

Complainants charge they are in no way liable for said sum, are not subject to said privilege tax, for the reasons hereinbefore set out, and having paid same under protest, as required by law, are entitled in this suit to recover back the full sum so paid, to wit: \$593.75, together with the costs of this cause.

VII.

Complainants further show the court that despite the fact that they have paid over ~~under~~ under protest, the privilege tax claimed by said defendants for the State, said defendant, Sam A. Con-
 9 nor, at the instance of defendants Hays and Worley, is now at complainants' place of business in Chattanooga, Tennessee, with said void and illegal distress warrant in his hands, and under authority of said warrant, is about to immediately distrain, seize and sell complainants' property, goods and wares in the sum of twice the amount of the privilege tax claimed for Hamilton County, together with costs, fees, penalties, etc., for the payment of said \$500.00, illegally and unlawfully claimed by said defendants as aforesaid for privilege taxes for Hamilton County, together with \$75.00 penalty, \$15.00 Sheriff's fees, \$2.25 costs, and \$1.50 Clerk's fees, totaling \$593.75; and, unless restrained, said defendants, and especially, defendant Sam A. Connor, will immediately under said process, distrain, seize and sell complainants' property in twice the sum of said privilege taxes wrongfully and illegally claimed by said defendants for Hamilton County for the year beginning January 1, 1912, and complainants will suffer irreparable injury in this; under said levy their stock of merchandise will be sold at a great sacrifice, their business demoralized and closed, and their credit and financial standing injured. They are doing and have been doing a comparatively large interstate business and while the actual value of their property about to be wrongfully seized and sold could be found and damages laid by a jury, the injury resulting from the demoralization of their employees and business, the destruction of their credit, and financial standing, through necessarily unfavorable reports by Commercial Agencies and recognized Credit rating bureaus in the Commercial world, and the loss of profits on sale, would not be susceptible

of ascertainment by a jury; but would mean real, prolonged, continuing and serious financial loss, in the sum of many hundreds of dollars.

Complainants further show the Court, defendants, unless enjoined will by litigation in other courts and the use of other methods attempt to enforce the collection of said illegal and unauthorized tax. That all matters with reference to said illegal assessment by defendants of said State and County privilege taxes and attempts to collect the same, can and properly should be litigated and decided in this suit and to prevent a multiplicity of suits, defendants and
 10 each of them should be enjoined from further attempting to collect said illegal county tax, except in this court and cause. Complainants have no full, adequate and complete remedy at law.

VIII.

Complainants are advised, believe and charge, they are in no way subject to said privilege taxes as set out; that said acts of defendants are void and illegal, without authority of law and a misuse and abuse of the offices of defendants, and will work a deprivation of complainants' rights as citizens under the laws of the State of Tennessee and of the United States.

IX.

Premises seen, complainants pray:

1. That defendants, W. P. Hays, J. Parks Worley, and Sam A. Connor be required by proper process to appear and answer this bill; but not under oath; their oaths to their answers being hereby expressly waived.

2. That a writ of injunction issue, restraining defendant Sam A. Connor from further proceeding to execute said distress warrant and restraining said defendants and each of them from further attempting to collect the County privilege tax hereinbefore mentioned and upon final hearing let said injunction be made perpetual.

3. Let it be adjudged and decreed that the laws of Tennessee and Hamilton County, do not impose a tax upon the privilege of engaging in interstate business as a dealer in spiritous liquors; and that the complainants are engaged in such business and not subject to said tax.

4. If the Court should be of the opinion that the statute hereinabove mentioned, and laws passed pursuant thereto, do impose a tax upon interstate liquor business, that said statute and County laws passed pursuant thereto, be, to that extent, declared violative of said Commerce clause of the Federal Constitution and void.

5. Let complainants have decree against said defendants, or such of them as the Court deems proper for said \$593.75 paid under protest as and for said wrongfully claimed State privilege tax, costs, fees, penalties, etc.

6. Let complainants have such further and other relief as the hearing shall disclose they may be entitled to.

7. Grant general relief.

- 11 8. This is the first applicatiob for extraordinary relief in this cause.

PAUL HEYMANN.

LITTLETON, LITTLETON & LITTLETON.
PRITCHARD, ALLISON & LYNCH.
WILLIAMS & LANCASTER.

STATE OF TENNESSEE,
County of Hamilton:

Paul Heymann makes oath that he is one of the complainants in the foregoing bill and is one of the partners composing the firm of Paul Heymann; and that the statements made in the foregoing bill, as upon knowledge, are true; and that made upon information and belief, he believes to be true.

PAUL HEYMANN.

Subscribed and sworn to before me this 1st day of June A. D. 1912.

[SEAL.]

A. B. LITTLETON,
Notary Public.

To the Clerk and Master of Hamilton County, Tennessee:

On complainant- giving a proper bond therefor, in penalty of one thousand dollars issue injunction as prayed in foregoing bill.

This first of June 1912 at 11:11 a. m.

T. M. McCONNELL, *Chancellor.*

To the Clerk and Master:

For reasons satisfactory to the Court the above fiat is extended to June 11th and the Clerk and Master is directed to file this bill upon the execution by complainants of proper cost bond; and upon the complainants giving a proper bond therefor in the sum of one thousand dollars on or before June 11th issue injunction as prayed in the foregoing bill.

This 10th June 1912 at 2:12 P. M.

T. M. McCONNELL, *Chancellor.*

- 12 This memorandum witnesseth, that I the undersigned, Sam A. Connor, Sheriff of Hamilton County, Tennessee, having in my hands a distress warrant, issued by W. P. Hays, Clerk of the County Court of Hamilton County, Tennessee, commanding me to distrain, seize and sell sufficient of the property of Paul Heymann and Jules Heyman, partners, doing business under the style of Paul Hayman, to satisfy the State and County Privilege taxes, costs fees, penalties, etc. on the privilege of carrying on the business of wholesale Liquor dealers, and being at the place of business in Chattanooga, Tennessee, of said Heymans having threatened to levy the same upon their goods and wares at said place of business, in twice the amount claimed for State and County taxes, together with costs, penalties, fees, etc. and being about to levy, seize and

sell sufficient of said property to satisfy the same, the said Paul Heyman and Jules Heyman denying their liability for same, under immediate duress of property, and to prevent a seizure of same, paid under protest to me, as and for the full State of Tennessee Privilege Tax on the privilege of carrying on a wholesale liquor business for the year beginning January 1, 1912, \$500.00; penalty thereon, \$75.00; Sheriff's fees thereon, \$15.00; costs of distress warrant \$2.25; Clerk's fees, \$1.50; totaling in all \$593.75, the receipt of which is here acknowledged.

Witness my hand this 1st day of June, 1912.

SAM A. CONNOR,

Sheriff of Hamilton County.

Injunction Bond.

Filed 12th Day of June, 1912.

Know all men by these Presents: That we Paul Heyman and Jules Heyman, principals, and United States Fidelity and Guarantee Company of Baltimore, are held and firmly bound unto W. P. Hays, J. Parks Worley and Sam A. Connor in the penal sum of One Thousand Dollars, for which payment well and truly to be made, we bind ourselves, and each of us our and each of our heirs, executors or administrators, jointly and severally, by these presents. Sealed with our seals, and dated this eleventh day of June, in the year of our Lord, One thousand Nine hundred and twelve.

13 The condition of the above obligation is such, that, whereas said principal obligor hath the day, of the date hereof prayed for and obtained from the Court of Chancery holden at Chattanooga in the State of Tennessee, a writ of injunction, returnable to the Chancery Court holden at Chattanooga, on the first Monday in July, next.

Now, if the said principal obligor shall prosecute the said injunction with effect, or in case he fails therein, shall well and truly pay and satisfy the said obligee-, or either of the-, all such costs and damages as may be awarded and recovered against the said obligors, in any suit or suits which may hereafter be brought for wrongfully suing out of said Injunction, and shall moreover abide by and perform such orders and decrees as the court may make in this case, and pay such costs and damages as the court may order, then the above obligation to be void; otherwise to remain in full force and effect.

PAUL HEYMAN.

[SEAL.]

JULES HEYMAN.

[SEAL.]

THE UNITED STATES FIDELITY &
GUARANTY CO.,

[SEAL.]

By ROBERT PRITCHARD,

Att'y in Fact.

Attest:

JNO. T. OWEN.

[SEAL.]

Witness.

WM. P. MEANS.

Injunction to Hamilton County.

Issued 11th June, 1912.

Injunction issued to Sheriff of Hamilton County for W. P. Hays Clerk of the County Court and returned with the following endorsement thereon:

Came to hand this 12th day of June 1912. Executed by reading and making known the contents of the within writ to W. P. Hays, Clerk and enjoining him as herein commanded. And in in all other respects complied with this writ.

This 13 day of June 1912.

JNO. A. MCGILL, D. S.

Subpœna to Answer.

Issued 12th June, 1912.

Subpœna to answer issued to Sheriff of Hamilton County for W. P. Hays, Clerk and returned with the following endorsement thereon:

14 Came to hand this 12th day of June 1912.

Executed by reading and making known the contents of the within writ to W. P. Hays, Clerk and summoning him as herein commanded. I gave a copy of the bill to W. P. Hays, Clerk this 13th day of June 1912.

JNO. A. MCGILL, D. S.

Subpœna to Answer.

Issued to Sullivan Co. 12th Day of June, 1912.

Subpœna to answer issued to Sheriff, Sullivan Co. and returned with the following endorsement thereon:

Service acknowledged:

J. P. WORLEY,
St. Rev. Ag't,
By S. M. CHAMBLISS.

Injunction to Sullivan Co.

Issued 12th Day of June, 1912.

Injunction issued to Sheriff Sullivan Co., and returned with the following endorsement thereon:

Service acknowledged.

J. P. WORLEY,
St. Rev. Ag't.
S. M. CHAMBLISS, Att'y.

Subpœna to Answer to Coroner.

Issued 12th June, 1912.

Subpœna to answer issued to Coroner of Hamilton County and returned with the following endorsement thereon:

Came to hand this 12th day of June, 1912.

Executed by reading and making known the contents of the within writ to Sam A. Connor and summoning him as herein commanded, I gave a copy of the bill to Sam A. Connor this 12th day of June 1912.

J. W. GILLESPIE, *Coroner.*

Injunction.

Issued to Coroner 12th June, 1912.

Injunction issued to Coroner of Hamilton County and returned with the following endorsement thereon:

Came to hand this 12 day of June 1912.

Executed by reading and making known the contents of the within writ to Sam A. Connor and enjoining him as herein commanded. And in all other respects complied with this writ.

This 12th day of June 1912, p. m.

J. W. GILLESPIE, *Coroner.*

15

Demurrer of All Defendants.

Filed 22nd July, 1912.

Defendants demur to so much of the bill as seeks to enjoin the collection of the County tax upon the ground that complainants are engaged in and intend to engage in interstate business; that is to say, selling only to parties outside of the State. Defendants demur for the reason that the privilege tax referred to is imposed by law upon complainant, under the facts set out in the bill and its imposition is not a burden on commerce between the states nor in conflict with the Federal Constitution.

II.

To so much of the bill as seeks an injunction on the grounds that the imposition of the tax referred to would destroy the business of the complainant because of the size of the tax as compared with the size of the business, defendants demur because it is wholly immaterial.

III.

Defendants demur to so much of the bill as seeks to recover from Sam A. Connor the sum of \$593.75, paid said Sam A. Connor

under protest as and for the State Privilege Tax for the year 1912; because the bill shows on its face that complainant was liable for said tax and the imposition of said tax was not a burden on commerce between the States, or in conflict with the Federal Constitution.

S. M. CHAMBLISS,
J. H. EARLY,
Solicitors for Defendants.

Final Decree.

Enrolled 22nd Day of July, 1912.

No. 13241.

PAUL HEYMAN et al.
vs.
W. P. HAYS, Clerk, et al.

Be it remembered that this cause came on to be heard on this July 22, 1912, before the Honorable T. M. McConnell Chancellor etc., upon the demurrer to the defendants' original amended and supplemental bills, and argument of counsel having been
16 heard said demurrer having been understood and considered by the Court, the Court is of the opinion that said demurrer is not well taken and is pleased to overrule and disallow the same; to which action of the Court defendants then and there excepted. And the defendants, in open Court refusing to plead, answer or make further defense of the said bill, preferring to rely upon their said demurrer, overruled by the Court as aforesaid, it is upon motion of complainants' solicitors ordered, adjudged and decreed by the Court that said bills be taken for confessed as against said defendants W. P. Hays, the Clerk of the County Court of Hamilton County, Tenn., J. Parks Worley, Revenue Agent for the State of Tennessee, and Sam A. Connor, Sheriff of Hamilton County, Tenn., and set for hearing ex parte.

And thereupon this cause coming on to be finally heard and determined upon the whole record, and the Court being of the opinion that the complainants are entitled to the relief sought, it is so adjudged; and it is ordered, adjudged and decreed by the Court that the injunction heretofore granted and issued in this cause, restraining the defendant Sam A. Connor, Sheriff of Hamilton County, Tennessee from further proceeding to execute the distress warrant issued against the complainants, and restraining said defendants W. P. Hays Clerk of the County Court of Hamilton County, Tennessee, J. Parks Worley, Revenue Agent for the State of Tennessee, and Sam A. Connor, Sheriff of Hamilton County, Tennessee, from further attempting to collect the County tax mentioned in the bills, be and the same is hereby made perpetual.

And it is ordered, adjudged and decreed by the Court that properly construed, the statute laws of Tennessee, do not impose a tax upon the privilege of engaging in interstate business as a dealer

in spiritous liquors, and that the complainants were at the time of the filing of the bill in this cause, and are now exclusively engaged in such business and not subject to such a tax imposed under or by virtue of said legislation.

The Court is of opinion and decrees that if the Act of the General Assembly of the State of Tennessee of 1909, Chap. 479, is subject to the construction that it imposes, or was designed or intended to impose a tax upon exclusively on the business engaged in by complainants, such Act is to that extent violative of the Commerce clause of the Federal Constitution, and for that reason unconstitutional and void.

And it appearing to the Court that on June 1st, 1912, defendant Sam A. Connor, Sheriff of Hamilton County, Tennessee, collected from the complainants Paul Heyman and Jules Hayman Partners doing business under the firm name and style of "Paul Heyman", the sum of \$593.75 as State Privilege Taxes, costs, fees penalties, etc. and that said sum was wrongfully collected from the complainants, and that they paid the same under protest and instituted this suit for the recovery therefor within the time allowed by law, and that complainants are entitled to recover said sum of \$593.75 so wrongfully collected from them and so paid by them as aforesaid, under protest, it is so adjudged; and it is ordered, adjudged and decreed by the Court that Paul Heyman and Jules Heyman doing business under the firm name and style of "Paul Heyman" have and recover of the defendants Sam A. Connor, Sheriff of Hamilton County, Tennessee, the sum of \$593.75 with interest from June 1st, 1912, for which execution is awarded.

The defendants will pay the costs of this cause, for which execution is awarded.

The defendants except to the whole of the foregoing decree and pray an appeal to the next term of the Supreme Court of Tennessee to be held at Knoxville, which is granted. S. M. Chambliss, appeared in open Court and acknowledged himself — for the costs of said appeal and said surety was accepted and approved by the Court.

18

No. 13241.

Parties:

Paul Heyman & Jules Heyman vs. W. P. Hays, Clerk of County Court of Hamilton, C. J. Parks Worley, Revenue Agent for the State of Tennessee, a resident of Sullivan County, and Sam A. Connor, Sheriff of Hamilton County.

Solicitors:

Littleton, Littleton & Littleton.
Pritchard, Allison & Lynch.
Williams & Lancaster.
S. M. Chambliss.
J. H. Early.

1912.

- Jun. 11. Original Injunction bill filed.
 " 11. Prosecution bond U. S. Fidelity & Guaranty Co. surety.
 " 11. Injunction Bond \$1,000.00 " " " " "
 " 11. Injunction issued Sheriff Hamilton Co. and returned 6/13 served by J. A. McGill, D. S.
 " 11. Copy of Bill 4,000 W. and spa. to ans. issd. to Shff. Hamilton Co.
 " 11. Injunction issd. to Coroner of Hamilton Co. for Sam A. Connor, Shf.
 " 11. Copy of bill 4,000 W. and spa. to ans. issd. to Coroner of Hamilton Co. for Shff.
 " 11. Injunction issd. to Shff. Sullivan Co. for J. Parks Worley, State Rev. Agent and retd. service Ackd. by S. M. Chambliss Att'y.
 " 11. Copy of bill 4,000 W. and spa. to ans. issd. to Shff. Sullivan Co. for J. Parks Worley State Rev. Agent and retd. service ackd. by W. M. Chambliss, Att'y.
 " 11. Spa. to ans. to Ham. Co. retd. 6/13 served by J. A. McGill, D. S.
 " 12. Spa. to ans. issd. to Coroner retd. 6/12 served by J. W. Gillespie, Cor.
 " 12. Injunction issd. to Coroner retd. 6/12 served by J. W. Gillespie, Cor.
 Jul. 22. Demurrer filed of all defendants.

1912, July term.

- Jul. 22. Decree overruling demurrer granting appeal S. M. Chambliss surety of record, 2 d.
 " 29. Motion of C. S. Littleton to withdraw papers filed.

19

No. 13241.

Parties:

Paul Heyman et al. vs. W. P. Hays, Clerk, et al.

Solicitors:

Littleton, Littleton & Littleton.

Pritchard, Allison & Lynch.

Williams & Lancaster.

S. M. Chambliss.

J. H. Early.

State Tax	2.50
County Tax	2.50

1912.

Jun. 11. Bill 25 aff. 25 Bond 25 recdg. 25 Inj.	
Bond 50	1.50
Recdg. 24 Inj. 1.00 copy bill. 4.00 cert.	
25 spa. 75.....	6.25
Inj. 1.00 copy bill 4.00 cert. 25 spa. 75....	6.00
Inj. 1.00 copy bill 4.00 cert. 25 spa. 75....	6.00

Demurrer 25 notice 25 decree 75.....	1.25	
Motion 10 dkt. 30 cost 50.....	.90	
		21.90
J. A. McGill, D. S. serving 1 dft. 1.00 1 inj. 1.00.	2.00	
J. W. Gillespie, coroner, 1 dft. 1.00 1 inj. 1.00..	2.00	
		30.90

July, Special term.

July 22. Decree overruling demurrer.
Granting appeal.

Costs incident to appeal.

Order appeal 25 surety record 50.....	.75
Transcript 7,600 W. 7.60 Seal 50 ex. 25.....	8.35

\$9.10

20 STATE OF TENNESSEE,
County of Hamilton:

I, Sam Erwin, Clerk and Master of the Chancery Court of said County, hereby certify that the foregoing nineteen pages of words and figures comprise a full, true and perfect transcript as required by the rules of the Supreme Court, of all the records, pleadings, exhibits, proof and proceedings had by said Court, in the cause where in Paul Heyman et al. are Complainants, and W. P. Hays, Clerk et al., are Defendants, as the same remains of record and on file in my office.

Witness my hand and the seal of said Court at office in the City of Chatanooga, Tennessee, this the 13th day of August, 1912.

(Signed)

SAM ERWIN, *Com.*

21 Filed Oct. 14, 1912. S. E. Cleage, Clerk, by Jas. T. Joy,
D. C.

22 In the Supreme Court at Knoxville, September Term, 1912.

No. 27. Hamilton Equity.

PAUL HEYMAN et al.

vs.

W. P. HAYES, Clerk, et al.

Assignment of Errors and Brief on Behalf of Appellants, W. P. Hayes, Clerk, et al.

Statement of the Case.

This suit was instituted in the Chancery Court of Hamilton County by complainants, claiming to be "interstate liquor dealers," for the manifest purpose of having reviewed and overruled the decision of this court in the case of Logan vs. Brown, Clerk, decided at the September Term, 1911, and holding that Logan was liable for the privilege tax imposed upon liquor dealers in this State, though

he only sold liquor to persons living in other States upon orders received by mail from such parties—the liquor being delivered by Logan to an Inter-state carrier in this State for shipment to the purchaser.

141 S. W. Rev., p. 751, et seq.

While, the carefully drawn bill by which complainants present their case, some distinction is attempted to be made from the case of Logan vs. Brown, Clerk, without naming that case, nevertheless, as we shall show, the material facts, though meagerly stated in this record, are not variant from those upon which this court predicated its decision in the Logan case.

23

Pleadings.

The original injunction bill filed on June 12, 1912, by the complainants against W. P. Hays, Clerk of the County Court of Hamilton County, J. Parks Worley, Revenue Agent for the State, and Sam A. Connor, Sheriff of Hamilton County, avers in substance:

1. That on January 1, 1912, complainants were the owners and had in their possession at their place of business or warehouse in the city of Chattanooga, Hamilton County, Tennessee, "a large stock of spiritous liquors," and that "since the first day of January 1912" they have confined their operations exclusively to the sale of said liquors to non-residents of the state for shipment out of and beyond the limits of the State, and that they have not, "since said date," sold or offered for sale or handled liquors for sale within the State of Tennessee—nor is it their desire or intention to sell or offer for sale liquors within the State of Tennessee.

The manner in which they carry on their said business is described in said bill as follows:

"The manner in which complainants have conducted their business since January 1st, 1912, and still conduct their business is as follows, and not otherwise: Complainants' said stock of liquors is kept in their warehouse at Chattanooga, Tennessee. Complainants solicit and receive orders by mail from citizens and residents of other states for shipment and delivery in such other states of said liquors and complainants neither solicit orders in Tennessee, nor solicit nor receive order for shipment and delivery at any points in Tennessee, nor make any such shipments or deliveries. Upon receiving orders from citizens and residents of other states for the shipment of liquors from the State of Tennessee into such other and different states and delivery there, complainants manifest their acceptance of such orders

24 by delivery of said liquors from their said place of business at Chattanooga, Tennessee, to railroads engaged in interstate traffic for continuous transportation and delivery only to points beyond the State of Tennessee, and to said purchasers; which said act of delivery closes the contract of sale; and complainants collect the price of the goods sold by checks and money orders mailed to them from said foreign states, either at the time the order is received, or after said liquors are received by said purchaser,"

2. That complainants have complied with the revenue laws of the

United States and have paid the Federal taxes assessed against them as liquor dealers, and hold Federal licenses to carry on business as such—that they have paid the merchants' tax based upon the value of their goods, and ad valorem, State County and city taxes upon the property used by them in connection with their business, and that up to the first of January, 1912, they have paid all of the privilege taxes provided by the Act of 1909, Chapter 479, by which we assume they mean the tax imposed by the State upon liquor dealers, as set out on pages 1742 and 1743 of the Acts of 1909.

3. The material provisions of the Act of 1909 applicable to liquor dealers are set out in the third paragraph of the bill, as are also the provisions of Section 16 of the said Act, providing—

"It is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the taxes prescribed for the exercise of the same, and all parties so offending shall be liable to a fine of not less than ten nor more than fifty dollars for each day such privilege is exercised without license; but this inhibition shall not apply to any person, firm or corporation engaged in Inter-state commerce."

25 And by paragraph 4 of said bill it is insisted that by virtue of the provisions of Section 13 of the Act of 1909, just quoted, the privilege tax imposed upon liquor dealers under Section 4 of said Act does not apply to complainants and that if it does apply to complainants it is in contravention of the commerce clause of the Federal Constitution.

4. That the defendant Hays as clerk of the County Court of Hamilton County, at the instance or upon the motion of the defendant Worley, as Revenue Agent, issued a distress warrant for the amount of the privilege tax imposed by said Act of 1909 in favor of the State and the County of Hamilton, and that said distress warrant, coming into the hands of the defendant Connor, as sheriff of Hamilton County, he, the said Connor, as sheriff aforesaid, threatened to levy the same upon the property of complainants and thereupon complainants paid over to said defendant Connor as sheriff aforesaid, under protest, the amount of the State tax, penalties, costs, etc., amounting to \$593.75; and the said Connor still threatening to levy said distress warrant upon the property of complainants to satisfy the privilege due the County of Hamilton, with penalties, etc., accruing thereon, this bill was filed for the purpose of recovering the said State tax so paid under protest and to enjoin the collection of the distress warrant as to the tax claimed to be due to the County of Hamilton. (Rec. pp. 7-8-9-).

5. That if the defendant Connor had been permitted to levy said distress warrant the "business" of complainants would have been demoralized—that they were doing comparatively a large inter-state business, and that the injury "resulting from the demoralization of their employees and business, the destruction of their credit in financial standing etc., could not have been ascertained by a

26 jury—in other words that the injury to their business would have been irreparable—so that on this ground and also on the ground to prevent a multiplicity of suits, complainants insist that they were entitled to this remedy in equity. (Rec. p. 8).

The bill prayed for an injunction restraining the defendant Connor as sheriff from proceeding to execute the distress warrant as to the county taxes, and that upon the hearing the injunction be made perpetual, and that complainant have a decree for the amount of the state taxes, etc., paid by them under protest. (Rec. p. 9).

Demurrer.

The defendants demurred to so much of the bill as sought to enjoin the collection of the county taxes upon the ground that under the facts stated in the bill the complainants were liable to the County of Hamilton for privilege, and that such privilege tax was not a burden on commerce between the States nor in conflict with the Federal Constitution. (Rec. p. 14).

Second. Upon the ground that the amount of the tax was wholly immaterial. (Rec. p. 14).

Third. That in respect of the State tax paid to the defendant Connor under protest the complainants *was* not entitled to relief because upon the facts stated in the bill complainants were liable for said tax, and that the same was not a burden on commerce between the States or in conflict with the Federal Constitution. (Rec. p. 14).

Decree.

The demurrer was overruled (Rec. pp. 14-15), and thereupon the defendants refused to plead, answer or make further defense
27 to said bill, but relying upon their demurrer, a pro confesso judgment was taken against them and upon the pro confesso judgment was finally rendered in conformity to the prayer of the bill. (Rec. p. 15).

The grounds upon which the Chancellor predicated his decree was (1) that the Act of 1909, Chapter 479, properly construed does not impose a tax upon the privilege of engaging in inter-state business as a dealer in spirituous liquors, and that the complainants at the time of the filing of the bill in this cause were exclusively engaged in such business, and therefore not subject to said tax; (2) that if said Act of 1909, Chapter 479, is subject to the construction that it impose, or was designed to impose a tax upon a business such as was being carried on by complainants, that said Act was void, because in contravention of the commerce clause of the Federal Constitution. (Rec. pp. 15-16).

Thereupon, the defendants prayed and were granted an appeal to this Court. (Rec. p. 16).

Assignment of Errors.

Come now the appellants and show that there is error in the decree of the Chancery Court of Hamilton County, in the following particulars:

1.

Upon the facts stated in the bill showing that the complainants were liquor dealers in the city of Chattanooga, Tennessee where they

had their place of business their stock of liquors and all paraphernalia necessary to carry on said business, and where they were engaged in carrying on the business or occupation of a liquor dealer, the Chancellor erred in holding first, that the Act of 1909, Chapter 479, insofar as it imposed a tax upon liquor dealers, does not apply to the occupation and business so carried on by the complainants, and second, that said act if construed to apply to the business, as described in the bill, is in contravention of the commerce clause of the Federal Constitution, and therefore void.

2.

Upon the facts stated in the bill the Chancellor erred in rendering a decree in favor of the complainants for the amount of the state tax, penalties, etc., paid by them under protest, because upon their own showing the complainants were and are liable for said tax.

3.

Upon the facts stated in the bill the Chancellor erred in rendering a decree enjoining the enforcement of the distress warrant as to the county privilege tax, penalties, etc., because upon the showing made by complainants in their bill they are liable to the County of Hamilton for said privilege tax, as liquor dealers—that is, personally engaged in the business and occupation of liquor dealers in Hamilton County, Tennessee.

4.

The Chancellor erred in not dismissing complainants' bill at their cost.

29

Brief.

The case presented to your Honors is in brief as follows:

The complainants are liquor dealers in the City of Chattanooga, Tennessee, and up to January 1, 1912, they had submitted to and paid all of the privilege tax imposed by the State upon such dealers in intoxicating liquors. (Rec. p. 3.) Their place of business is in Hamilton County, Tennessee, where they keep on hands and have stored in their warehouse a large stock of spiritous liquors (Rec. p. 2), in and about their said stock of spiritous liquors (Rec., p. 2), and in and about their said business, in addition to themselves, they have engaged a number of employees (Rec. p. 8)—the number not stated, but it is manifest that they have a considerable number of employees engaged in their business, inasmuch as they carry a large stock of intoxicating liquors.

Now, it is claimed by them that since the first day of January, 1912, they only sell to persons living outside of the State, upon orders received by mail at their place of business in Chattanooga, and that the goods sold in consequence of said orders they deliver to some railroad running out of Chattanooga, engaged in inter-state traffic for continuous transportation to the purchaser outside of the State, and that the price for the goods so sold is paid to them by

checks or money orders received in the mail "either at the time the order is received," or after the liquors are received by the purchasers. (*Red*, pp. 2-3.)

Complainants also have procured from the Internal Revenue Commissioner United States Revenue license, authorizing them to carry on the business in Chattanooga, as liquor dealers.

Complainants are citizens and residents of Chattanooga, Hamilton County, Tennessee, where they have their place of business aforesaid.

Complainants say they do not intend to sell or offer to sell any liquors, except as hereinbefore stated. (*Rec.* p. 2.)

Upon these facts we respectfully insist that the complainants are liable for the privilege tax imposed upon liquor dealers by the Act of 1909, Chapter 479—that is, the tax imposed upon the occupation or business of a liquor dealer carried on in this State.

We submit that the material facts in this case are in no wise different from those involved in the case of *Logan vs. Brown*, Clerk, 141 S. W. 751, although in some particulars complainants have endeavored to avoid or escape the supposed effect of certain matters in that case noted by the court in its opinion, but which, we submit, in no wise affected the conclusion reached by this court.

In *Logan vs. Brown*, Clerk, *supra*, after stating the facts set forth in the stipulation upon which that case was tried—which we insist are not materially different from the case at bar—this court said:

"Neither is the complainant protected from the privilege tax by the commerce clause of the federal Constitution, in our opinion, and this, we think, is true for several reasons:

"First. The liquor traffic is a well-recognized subject of police regulation. The exaction of a license fee from a liquor dealer is an ordinary exercise of police power. The mere levy of an occupation tax upon a liquor dealer, a resident of Tennessee, with his house and business established in Tennessee, even though he ships his sales to other states, cannot be held to be a regulation of commerce between the states. Certainly it is no more a regulation of commerce than the imposition of a tax upon the owners of ferries whose boats ply between landings in different states. The power of the state

so to tax ferries was upheld in *Ferry Co. v. East St. Louis*, 107 U. S. 335, 2 Sup. Ct. 257, 27 L. Ed. 419.

"A license was required in that case by the city of East St. Louis, and the court said: 'The exaction of a license fee is an ordinary exercise of police power by municipal corporations. When, therefore, a state expressly grants to an incorporated city, as in this case, the power to license, tax, regulate ferries the latter may impose a license tax on the keepers of ferries, although the boats ply between lands lying in two different states and the act by which this exaction is authorized will not be held to be a regulation of commerce.' *Ferry Co. v. East St. Louis*, *supra*; also *Fanning v. Gregorie*, 16 How. 534, 14 L. Ed. 1043; *Conway v. Taylor*, 1 Black, 603, 17 L. Ed. 191."

And in this connection it is proper to note that, while the Act of 1909, Chapter 479, is commonly called the Revenue Act, nevertheless, insofar as it affects liquor dealers it is expressly provided that

nothing in said act contained shall authorize or legalize the sale of liquors, and it has been repeatedly held by this court that the heavy privilege tax imposed upon liquor dealers is intended to be in aid of the statutes of this state regulating and controlling the sale of liquor.

Foster v. Speed, Clerk, 120 Tenn. 470.

Carpenter v. State, 120 Tenn. 586.

Further, after calling attention to certain phraseology of the agreed statement of facts in the Logan case, in respect of the use of the present tense—which is done in the bill in this case—this court said:

32 If we concede, however, that it is intended to be said complainant has never made sales to parties within the state, still there is no guaranty that he will continue so to exclude such parties from buying hereafter. He has his house in Tennessee, his liquors in Tennessee his equipment and location, and is prepared to make sales in Tennessee. He is entitled, under the law, to sell his liquor for medicinal, mechanical, scientific, culinary and all other purposes, save for beverage purposes alone. Kelly v. State (Wholesaler's Case) 123 Tenn. 516, 132 S. W. 193.

"Looking to the organization and equipment of complainant's business, it must be conceded that he is engaged in the general occupation of a liquor dealer in Tennessee, such occupation is declared a privilege and a tax is demanded by the state for its pursuit.

The fact that particular sales so far made by him have been to non-residents does not relieve his business of the privilege tax, by reason of any provision of the federal Constitution.

"This conclusion seems to us fully warranted from the case of Ficklen v. Taxing District, 145 U. S. 1, 12 Sup. Ct. 810, 36 L. Ed. 601.

"In this case, the court considered a merchandise broker's tax, which was imposed upon certain parties in the taxing district of Memphis, the business of one of whom was entirely between non-resident principals. Speaking of the case, the court said:

"In the case at bar, the complainants were established and did business in the taxing district, as general merchandize brokers, and were taxed as such under section 9 of chapter 96 of the Tennessee Laws of 1881, which embraced a different subject-matter from section 13 of that chapter. For the year 1887, they paid the tax of

33 \$50 00 charged, gave bond to report their gross commissions at the end of the year, and thereupon received, and throughout the entire year held, a general and unrestricted license to do business as such brokers. They were thereby authorized to do any and all kinds of commission business, and became liable to pay the privilege tax in question. It was fixed in part, and in part graduated according to the amount of commissions received. Although the principal happened, during 1887, as to the one party to be wholly non-resident and as to the other largely so, this fact might have been otherwise then and afterwards, as their business was not confined to transactions *nor* non-residents."

"The authorities are viewed to a considerable extent, and the

result of the entire case we find to be well summarized in one of the headnotes, as follows:

"A state legislature may tax trades, professions, and occupations in the absence of inhibition in the state Constitution in that regard; and, where a resident citizen is engaged in a general business, subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between residents and non-resident merchants of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution."

"While it is true, at the conclusion of this opinion, the following language is used:

"What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no license therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record." While it is true this language is used, it

has no application here, for this complainant is no broker or
34 agent, doing business for nonresident principals. He is a resident of Tennessee, doing business for himself in Tennessee.

The circumstances that he has failed to apply for license to engage in the occupation of a liquor dealer does not determine the question of whether or not he is engaged in such general occupation. We think he is so engaged, and is accordingly liable for the tax, although his sales, so far, have been to purchasers without the State.

"Third. The tax imposed upon complainant has reference to his business within the state, and interposes no obstacle to his sales and shipments out of the state.

"He has his business house in Tennessee, where he gathers his stock of goods. He here receives his purchase, breaks bulk, assort his stock, and here keeps it. He gets his orders, prepares his shipments, delivers to the carriers, and received his remittances in Tennessee. In fact, every detail of his business is withinm, and under the protection of, the State of Tennessee except that he makes his sales to parties without the state, and purchases his stock from outside the state, which latter incident has no bearing on the controversy, by reason of the provisions of the Wilson act, heretofore mentioned.

"We are of the opinion that the state has a right to declare the doing of these things within her borders a privilege, and to tax such privilege accordingly.

"The state may tax a business or occupation and the fact that the stock of a particular dealer, engaged in such business or occupation, happens to have been bought and brought in from some other state will not relieve him of the tax. *Woodruff v. Parham*, 8 Wall, 123 19 L. Ed. 382. *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257.

35 "As was observed by the Supreme Court, in the case of *American Steel & Wire Company vs. Speed*, Supra these two cases announced a doctrine years ago which has never since been questioned, and has become the basis of the taxing power exerted

for years by all the states of the Union. The cases themselves have been approvingly referred to in decisions of this court too numerous to be cited.'

"If a dealer, engaged in a particular business, may be required to pay a tax levied upon that business even though he purchase all his goods without the state we can perceive no reason why a dealer, engaged in a particular business may not be required to pay a tax levied upon that business, even though he sells all his goods within the state. The tax is no more a burden on commerce in the one instance than in the other. It is not exacted of the interstate traffic in either case, but of the business in both cases.

"Upon this question, the somewhat recent holding of the Supreme Court, in *Cargill v. Minnesota*, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619, seems determinative.

"In that case, the state of Minnesota had passed an act regulating the business of grain elevators. Among other things, it required that all persons operating such elevators should obtain a license therefor from the proper state authorities. A fee was charged for this license. Considerable business was transacted at these elevators in the way of purchasing wheat, but the entire sales of the particular elevator considered in the case referred to were to nonresidents, and all its grain was sold and shipped to parties outside the state.

It was urged upon the court that the license required of this elevator, in view of the character of business it was doing, was a violation of the commerce clause of the federal constitution.

36 "In response to this, the court said:

"It is also contended that the requirements of a license from the defendant company is inconsistent with the power of Congress to regulate commerce among the states. This view cannot be accepted. The statute puts no obstacle in the way of the purchase, by the defendant company, of grain in the state, or the shipments out of the state of such grain as is purchased. The license has reference only to the business of the defendant at its elevator and warehouse. The statute only required a license in respect to business conducted at an established warehouse in the state, between the defendant and the sellers of the grain. We do not perceive that, in so doing the state has intrenched upon the domain of Federal authority, or regulated, or sought to regulate commerce. In no real or substantial sense is such commerce *in no real or substantial sense is such commerce* obstructed by the requirements of a license.' *W. W. Cargill Co. v. Minnesota ex rel., etc.*, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619.

"We are of opinion that the foregoing is sound authority upon which to base the conclusion heretofore announced, that this complainant is only taxed with reference to matters transacted by him at his business house, and as to his purchasing business and other parts of his business and does not refer to our burden his sales to parties outside the state."

It is true that in the opinion in the Logan case the Court, in passing, remarked that there was no guaranty that Logan would

continue to exclude persons in this State from purchasing his liquors, and we assume that complainants attempted to meet this statement by their averment that they did not intend to sell or offer for sale liquors to people living in Tennessee—but even as to this there is no guaranty.

37 However, we submit that this question as to their intention is wholly immaterial, because the tax is not imposed or directed at a sale to a person living in another state—is not levied because of such a sale—but is imposed upon the business or occupation carried on by complainants in Hamilton County, Tennessee.

Moreover, we respectfully submit, that it is not merely the selling of liquor that renders the complainants liable for this tax—it is immaterial whether they makes many or few or no sales—it is immaterial whether their business be successful by reason of many sales or a failure because they do not make sales, for the reason it is a tax upon the occupation or business and that tax becomes due and payable whenever a person enters upon such a business, or seeks to engaged in such occupation, without regard to whether he makes a sale or not. Upon this proposition we call to the attention of your Honors the case of *Stanford v. State*, 16 Texas Appeals, 331-2, wherein, among other things, it is said:

“A single sale of intoxicating liquors would not of itself constitute pursuing or following the occupation of a liquor dealer. ‘Occupation,’ as used in this statute, and as understood commonly, would signify vocation, calling, trade, or business which one principally engages in to procure a living or obtain wealth. It is not the sale of liquor that constitutes this offense. It is the business of engaging in the sale without paying the occupation tax. It does not require even a single sale to constitute the offense, for a person may engage in the business without succeeding in it even to the extent of one sale. So, on the other hand, a person may make occasional sales of liquor without pursuing or following, or intending to pursue or followm the occupation of selling liquor.”

To further illustrate our contention, we call to your
38 Honor’s attention the distinction which the federal government makes between its tax upon a business and the mere making of a sale.

In the case of *Ledbetter vs. U. S.* 170 U. S. 606-610, involving the liability of *Ledbetter* to tax imposed upon a dealer in liquors, the Supreme Court said:

“The offense does not consist in selling or offering for sale to a particular- distilled spirits, etc., in less quantities than five gallons at one time, but in carrying this on as a business; in other words, in the defendant holding himself out to the public as selling or offering for sale, etc. While it has been sometimes held that proof of selling to one person was, at least, *prima facie* evidence of criminality, the real offense consists in carrying on such business, and, if only a single sale were proven it might be a good defense to show that such sale was exceptional, accidental or made under such circumstances as to indicate that it was not the business of the vendor.”

We understand that the learned Chancellor predicated his de-

cision largely upon the case of *Stockard v. Morgan*, 185, U. S. 27, but that case is clearly distinguishable from the case at bar in that the Supreme Court had before it the effect of the Revenue Act of 1899, Chapter 432, applied to brokers of merchandise, and which levied a privilege tax against such brokers in the following language: "Which shall include, when the sale is made in the state, all sellers of merchandise to consumers upon orders or samples, and also all agents engaged in such business." (Acts of 1899, p. 39 1016).

The question before the Supreme Court was whether *Stockard* and others, who were acting solely as agents of certain non-resident merchants, were liable for this privilege tax when they solicited orders in Chattanooga, sometimes exhibiting samples, for goods which were in another state, and belonged to merchants whose places of business were in another state.

The controlling question before the Supreme Court of the United States for determination, and which was determined by it is stated in the language of that Court, as follows:

"In view of these fundamental principles which are to govern our decision, we may approach the question submitted to us on the present case, and inquire whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states, if selling or seeking to sell their goods in such state before they are introduced therein."

185 U. S. 32.

And it was held by the Supreme Court of the United States that this question was ruled by the *Robbins* case, (120 U. S. 489). And that *Stockard* and others merely representing non-resident owners of goods might lawfully solicit orders for said goods in this state without becoming liable to the privilege tax imposed by the Act of 1899—that such a tax was a burden upon the non-resident owner and a restriction upon his right to sell goods in Tennessee before they were introduced into this state.

Beyond the statement just made we insist that the *Stockard* case does not go, and we call to the attention of your Honors that the *Ficklen* case, 145 U. S. 1, cited and approved in the opinion of this court in the *Logan* case, was not overruled but distinguished from the *Stockard* case—as it is clearly distinguishable in its facts, which approximate in principle of the facts involved in the case at bar.

The Business of a Liquor Dealer is Essentially Local.

The Federal Government (Revised Statutes, Section 3239) requires every person engaged in any business, avocation or employment, liable to a special tax—such as a liquor dealer—to post and keep conspicuously in his establishment or place of business all stamps denoting the payment of said special tax, etc. and the payment of such tax does not authorize a sale of liquor by the holder of the stamp at any other place than that named in the application, and where the same is to be kept posted.

To apply the federal rule to the case of complainants they are authorized to sell, under the federal license held by them, only at the place where they keep their license or stamp posted, and if they make a sale elsewhere, even at the depot or from house of the railroad, where they claim that they consummate the sales made by them, they violate the federal statute.

There is no such thing known to the federal statute as a license or stamp tax upon an inter-state dealer.

While the amount of the privilege or license tax imposed by the laws of Tennessee upon the business of a liquor dealer is found in what is commonly known as the Revenue act, nevertheless, as we have already shown, it is well settled in this State that the license tax imposed upon the business of a liquor dealer is not only to raise revenue, but is intended to operate as a further police regulation over such business, which can only be carried on in some definite and fixed place.

41 More than half a century ago it was enacted by the General Assembly that the right to sell intoxicating liquors—that is, the right to carry on the business of *as* a dealer in intoxicating liquors, was a privilege to be exercised only after a license therefor had been procured in compliance with the terms and conditions specifically provided by the statute.

Shannon's Code, Section 1992, et seq.

By section 993 it is among other things provided that before the license issues the applicant must deliver to the clerk a sworn statement of the value of the liquors about to be offered for sale at the establishment for which he demands a license.

And so we pause to note that this court held in the case of *Butler v. State*, 1 Shannon's Cases, that the holder of a license cannot lawfully sell liquor—that is, carry on the business of a liquor dealer—at any other place than the establishment named in the license. So we see that both the federal and state laws contemplate a fixed location for the business of a liquor dealer.

There is no tax, federal or state, upon the mere selling of liquor from one state to another, because these excise taxes are upon the occupation or business and are directed at not only raising revenue, but the regulation of the business or avocation of dealing in liquor. And in the very nature of things a business must have not only a name but a fixed location.

The privilege tax imposed by the Act of 1909 applies to the business of complainants.

It is alleged in the bill that the Act of 1909 does not apply to complainant, because, as claimed by them, they are engaged in inter-state commerce, and to support this contention they rely upon the concluding clause of Section 16 of the Act in question.

Said section 16 declares that it shall be a misdemeanor to exercise any of the foregoing privileges named in the Act without
42 first paying the tax prescribed for the exercise of the same, and all parties so offending shall be liable to a fine for each day such privilege is exercised without license, and concludes as follows:

"But this inhibition shall not apply to any persons, firm or corporation engaged in inter-state commerce."

It is a complete answer to the insistence on behalf of complainant to point out that the words "this inhibition" apply only to the thing denounced in that section, which is the exercise of a privilege without paying the tax resulting in a fine for such failure. This clause can mean nothing more. However, this question aside, we respectfully submit that it is not sought to impose a privilege tax upon complainants for engaging in interstate commerce. It is their business located in Chattanooga which is taxed. There is no effort to tax their interstate sales. The sales alleged to have been made by them are not in any way connected with inter-state commerce until after they are delivered to a carrier for transportation out of the state. It is not these acts which the statutes seek to tax, but the definite fixed business in Chattanooga, and that business or occupation is not in any sense inter-state—it is not inter-state commerce but fixed and local.

The fact that the business and occupation is carried on with the ultimate purpose that the liquors are to be sold for shipment into other states does not make such business and occupation inter-state commerce. If that were so liquors manufactured solely for sale and shipment into other states could not be prohibited, because such prohibition would be an interference with inter-state commerce, but this question is settled beyond controversy both by the Supreme Court of the United States and by this Court.

Kidd vs. Pearson, 128 U. S. 115.

Motlow v. State, 145 S. W. 177 et seq.

43 In all the agitation over this question—in all the different forms of litigation growing out of this question—it has never before been claimed that the business or occupation of a liquor dealer in a dry state is exempt from the laws of such state to the extent even that such business can be carried on in the dry state for sales and shipments into other states.

The nearest approach to such claim is to be found in the case of *State vs. Fitzpatrick*, 16 R. I. 54, which involved the storage of liquors in the State of Rhode Island, but the Supreme Court of that State rejected as utterly unsound the claim of Fitzpatrick that he could keep or store liquors on his premises for sale and transportation into another state.

For these reasons we respectfully submit that the decree of the Chancellor should be reversed and complainants' bill dismissed.

CHARLES T. CATES, JR.,
Attorney General.

S. M. CHAMBLISS,
Of Counsel.

44 Filed October 30, 1912. S. E. Cleage, Clerk.

45 In the Supreme Court of Tennessee, at Knoxville, Tennessee,
September Term, 1912.

No. 27. Hamilton County Equity.

PAUL HEYMAN et al.

vs.

W. P. HAYS et al.

and

No. 28. Hamilton County Equity.

SOUTHERN OPERATING COMPANY

vs.

W. P. HAYS et al.

Brief for Appellees, Paul Heyman et al, and Southern Operating Company, In Reply to Brief Filed in This Cause by Appellants, W. P. Hays et al.

May it please the court:

As the above cases present practically the same questions of law, with the single exception that in the Southern Operating Company case there is one question not raised in the Paul Heyman case, to-wit; the right to enjoin the collection of the State Tax where a multiplicity of suits and irreparable injury is shown, we shall discuss these cases together.

Statement of the Case.

The bills charge that on January 1st, 1912, appel-ees were, and since continuously have been and still are, engaged in interstate commerce business exclusively, as follows:

At said date they lawfully owned and had in their possession large stocks of spiritous liquors.

The laws of the State of Tennessee, recently enacted, regulating domestic traffic in intoxicating liquors are such that appellees cannot profitably conduct that character of business. For this reason appellees have, since that first day of January 1912, confined and still confine their operations exclusively to the sale of said liquors to non-residents of the State of Tennessee, for shipment out of and beyond the limits of the State of Tennessee and into other states for delivery there, and have not, since that date, sold or offered for sale, nor do they desire or intend to sell, or offer for sale, any liquors for any purpose, within the State of Tennessee. They have resorted to no subterfuge or evasion of the laws of the State of Tennessee regulating or prohibiting domestic traffic in intoxicating liquors, and they have in no way engaged in such domestic traffic.

The manner in which appellees have conducted their business since January 1st, 1912, and still conduct their business, is as follows and not otherwise; Appellees' said stock of liquors are kept in their warehouses at Chattanooga, Tennessee. Appellees solicit and receive orders by mail from citizens and residents of other states

47 for shipment and delivery in such other states of said liquors, and appellees neither solicit orders in Tennessee, nor solicit nor receive orders for shipment and delivery at any points in Tennessee, nor make any such shipments or deliveries. Upon receiving orders from citizens and residents of other states for the shipment of liquors from the State of Tennessee into such other and different states and delivery there, appellees manifest their acceptance of such orders by delivery of said liquors from their said places of business at Chattanooga, Tennessee, to railroads engaged in inter-state traffic for continuous transportation and delivery only to points beyond the State of Tennessee, and to said purchasers; which said act of delivery closes the contract of sale; and appellees collect the price of the goods sold by checks and money orders mailed to them from said foreign states, either at the time the order is received, or after said liquors are received by said purchasers.

Appellees have complied with all the Revenue Laws of the United States and of the State of Tennessee, applicable to them. They have paid the federal taxes assessed against them as liquor dealers and hold federal licenses to carry on business as such. They have paid the State, county and city taxes upon their properties and the ad valorem taxes based upon the values of their stocks of goods, commonly known as "Merchants' Tax," and complainants are advised, believe and charge, they are subject to no further assessment for taxation. And appellees have paid all privilege taxes claimed by defendants, including the privilege taxes provided for in Chapter

48 479, Acts of 1909, up until the first day of January, 1912. No privilege tax is claimed by the State on business done by complainants prior to said date.

It will be noticed that the facts in these cases differ from the facts in the Logan case in the following particulars:

1st. The purchase of liquors is not involved in these cases under the allegations of the bills. Appellees had on hand on January 1st, large stocks of liquors. Their exclusive business, under the allegations of the bills, since January 1st, 1912, is the sale of these liquors in inter-state commerce.

2nd. Appellees do not break bulk and assort these liquors at their warehouses. The bills charge that, except in so far as they own and keep their liquors which previously they had lawfully acquired, they are engaged exclusively in negotiating sales for and selling the same in interstate commerce.

3rd. The bills charge that they have not sold, or offered for sale, any liquors in Tennessee, since January 1st, 1912. In the Logan case the Court laid particular stress on the fact that the present tense was used and that the fact that Logan had made sales since the date therein mentioned was not negatived. In the cases at bar,

appellees have made no sales, and offered to make no sales, and attempted to make no sales in Tennessee, since January 1st, 1912.

4th. The bills expressly charge that it is not the desire of the appellees, nor do they intend to make local sales in Tennessee.

5th. The bills expressly allege that appellees "manifest
49 their acceptance of such orders by delivery of said liquors from their said places of business at Chattanooga, Tennessee, to railroads engaged in interstate traffic", etc.

In short, appellees owned and had in their possession stocks of liquors on January 1st, 1912. These stocks of liquors they are seeking to dispose of alone by sales to non-residents of Tennessee. They merely own the liquors, and until they can sell them, store them on their premises and they are now engaged exclusively in getting rid of these stocks of liquors by inter-state sales.

In the Southern Operating Company case, the bill alleges that appellants had threatened to, and were about to assess, and, by distress warrant, attempt to collect from it the privilege tax for the first quarter of the year 1912, imposed upon wholesale liquore dealers by Chapter 479 of the Acts of 1909; and further, had threatened to, and were about to, assess, and, by distress warrant, attempt to collect from it the Hamilton County privilege tax in a like sum for the first quarter of the year 1912, imposed by and under color of said Act of 1909; and will thereafter every three months, or every quarter, assess, and, by distress warrant, attempt to collect the quarterly installments of said privilege taxes.

In the Heyman case the bill alleges that distress warrants had actually issued for the State and County privilege taxes provided
50 appellee's premises, and *were* about to levy the distress warrant; and under duress of property appellees paid the full State tax, together with penalties, costs, etc. for the year beginning January 1st, 1912; but declined to pay the County Tax and in their bill sought to enjoin the collection of the latter.

Upon the foregoing statement of facts appellees insist that Chapter 479 of the Acts of 1909 and the laws passed pursuant thereto, have no application to the business of appellees, which are strictly interstate commerce; or, if said Act be construed to apply to the business of appellees, that it contravenes the interstate commerce clause of the Federal Constitution; and they expressly invoke the protection of that clause.

Both bills allege multiplicity of suits and irreparable injury; but the Court is expressly referred to the bills for the allegations on this point, as the Southern Operating Company case makes out a much stronger case of multiplicity of suits and irreparable injury. Later in discussing this matter we shall call particular attention to these differences.

The Paul Heyman bill seeks a judgment against appellants for the State tax paid under protest; and seeks to enjoin the County tax. The Southern Operating Company seeks to enjoin both the State and County tax.

Appellants demurred to both bills, which demurrers were overruled by the Chancellor and judgments pro confesso and final de-

51 cree rendered by the Chancellor in each case, according to the prayer of the bills. From this appellants prayed and were granted an appeal and have assigned errors in this Court. The errors assigned embrace the following questions alone:

As to the Right.

1st. Does Chapter 479 of the Act of 1909, imposing a privilege tax upon wholesale liquor dealers apply to appellees?

2nd. If this Act be construed to apply to appellees, does it contravene the interstate commerce clause of the Federal Constitution, in so far as it applies to appellees?

If the insistence of the appellees as to the two propositions just above set out is correct, then the following additional questions are presented:

As to the Remedy.

1st. Had the Chancery Court the jurisdiction to enjoin the collection of the State privilege tax under the facts alleged in the Southern Operating Company bill?

(This question is not involved in the Paul Heyman case, as Heyman paid this tax under protest).

2nd. Had the Chancery Court jurisdiction to enjoin the collection of the County taxes under the allegations of the bills?

3rd. Did Heyman comply with the requirements of the Act of 1873 in paying under protest, etc.?

(We think, however, though there is a general assignment on this question, the Attorney General does not insist that Heyman did not pursue his proper remedy as to the State Tax.)

52 *Brief and Argument.*

We shall discuss these questions in the order hereinabove named: Chapter 479 of the Acts of 1909, has no application to the business of appellees:

We concede at the outset, that unless they are engaged in interstate commerce, Chapter 479 of the Acts of 1909, applies to appellees. We shall later discuss fully the question as to whether or not the appellees are engaged solely in inter-state commerce, but for the present we simply desire to show that in the Act in question it was not the intention of the Legislature to declare the occupation of carrying on interstate commerce a privilege and lay a tax upon it.

This is in reply to the apparent insistence of the learned Attorney General, at page 20 of his brief in the Southern Operating Company case, that this act does not except from its provisions persons, firms or corporations who are engaged solely in Interstate Commerce.

It is a well settled principal of law that an Act will be so construed as to sustain its constitutionality if there is a possibility of such construction. We take it to be well settled at this day that a

State prohibit interstate commerce. This principle was expressly enunciated in the case of *Kelly v. State*, decided by this Court in 1910. We take it to be further well settled that unless the State can prohibit an occupation, it cannot declare it a privilege:

53 "To constitute a privilege, the occupation or business transacted must be such that the Legislature, could forbid that it be pursued or done, and which could only be pursued or done under license issued by the authority of the State."

Nation'l Bk. of Chattanooga v. Mayor & Alderman of Chattanooga, 8th Heiskell, 815; Lawyer's Tax Cases, 8 Heiskell, 573, and authorities there collated in the brief of Collier, Foote & Collier, therein set out.

Hence, it having been expressly held in *Kelly v. State*, 123 Tenn., that the State cannot prohibit interstate commerce, we submit it cannot declare the carrying on of interstate commerce a privilege and tax it as such.

The Legislature did not intend that the Act of 1909 should contravene the Commerce clause of the Federal Constitution, or apply to any occupation or transaction within the protection of that clause. Such a construction would render the Act unconstitutional, as we shall hereinafter more fully show. As an indication of this intention on the part of the Legislature, Section 16 of said Act provides:

"It is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the privilege tax prescribed for the exercise of the same, and all parties so offending, shall be liable to a fine of not less than ten nor more than fifty dollars for each day such privilege is exercised without license; but, this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce."

The distinguished Attorney General would limit the application of the concluding clause of this section to the penalties therein provided. In this, we submit, he is clearly in error.

In creating a privilege, two things are necessary:

54 1st. There must be an inhibition or prohibition of the act declared to be a privilege, and;

2nd. Certain conditions under which the act can be done or the occupation followed.

As stated in the able brief of Colyar, Foot & Colyar, and authorities in support of same in Lawyer's Tax Cases quoted in 8th Heiskell, 573:

"In the very nature of things, there must first be a prohibition before there can be a privilege."

Which, then, is the section in this Act which prohibits, or inhibits, the occupations therein set out?

Quoting again from Lawyer's Tax Case, 8 Heiskell, 573:

"All these authorities go to show that where a penalty is fixed in a statute it implies a prohibition."

Section Four of the Act of 1909, provides:

"That each avocation, occupation or business hereinafter named in this section is hereby declared to be a privilege and the rate of

taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the County Court Clerk as provided by law for the collection of revenue."

Certainly this is not the "inhibiting" or "prohibiting" section.

Section 16 provides:

"It is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the privilege tax," etc.

These sections are to be construed together. Section Sixteen is clearly the inhibiting or prohibiting section of the Act. 54½ Section Four merely defines the thing inhibited or prohibited. The Legislature in passing the Act must have intended the same to be construed according to previous holdings of this Court; and, hence, when it declared the carrying on of these occupations a misdemeanor, recognized Section 16 as the prohibiting or "inhibiting" section of the Act. That necessarily they must "prohibit," or "inhibit" an occupation, else all persons could carry on the same. Having thus created a privilege, they then tax it. The Act, itself, recognizes that this section, declaring this a misdemeanor and inflicting punishment is the "inhibiting" clause of the statute, in the following words; "but this inhibition," etc. This section prohibits the carrying on of each and every occupation defined in the Act except under certain circumstances. The inhibition in this section applies to each and every occupation set out in the Act. That being the case, our insistence is, that the Legislature, as clearly expressed in the face of the Act, intended that the "inhibition" or "prohibition," without which there could be no privilege, should not contravene the Interstate Commerce Clause of the Federal Constitution, and, hence, they excepted from the various occupations prohibited or inhibited, interstate commerce.

Any other construction of the Act (if the insistence of appellees is correct, in that the occupation of carrying on interstate commerce cannot be declared a privilege and taxed as such, and that appellees are engaged in such businesses); must render the act unconstitutional.

However, while appellees hope the Court can see its way clear to give a constitutional construction to this Act if their insistence is correct, and they are within the protection of the Interstate Commerce Clause of the Federal Constitution, so far as their rights in this suit are concerned, whether or not they are excepted from the prohibition of the Act of 1909, can make little difference, as, of course, in so far as the statute operates to contravene Constitutional rights it would be void.

This brings us to the real question in the case, to-wit:

Are appellees engaged in the occupation of carrying on interstate commerce, and if so, can the State declare such an occupation a privilege and tax it as such?

We shall discuss these questions under the next head.

Does the Act of 1909 apply to appellees, and if so in so far as it applies to appellees, does it contravene the Interstate Commerce Clause of the Federal Constitution?

We may at once concede that unless the exception provided under section 16 of the Act hereinabove discussed applies to appellees, they are clearly within the provisions of the Act of 1909. Appellees admit that they are selling liquors and are following such occupation as a business. As we shall hereinafter attempt to show, it is this occupation that is taxed. Our insistence is, however, that while appellees fall within the definition of liquor dealers as defined in the Act of 1909, their sole business is that of carrying on interstate commerce and they are within the protection of the Interstate Commerce Clause of the Federal Constitution.

The learned Attorney General in his brief seems to be of the opinion that *Logan v. Brown*, decided at the September Term, 1911, of this Court (141 S. W. 151) and cases therein cited, are conclusive upon this question. In this, we respectfully submit he is in error, in that he considers only the principles and cases therein discussed *arguendo*, and overlooks the real principle upon which the Court predicated its decision. We shall first address ourselves to the authorities discussed by this Court in its opinion in the *Logan* case.

The Ferry Cases.

In the *Logan* case, the Court, as a matter of dictum apparently, attempted to draw a distinction between the occupation of carrying on interstate commerce, and interstate commerce, itself, indicating that while interstate commerce could not be regulated, the occupation or business of carrying on such interstate commerce could be taxed; and in support of this theory cited the case of *Ferry Company v. East St. Louis*, 107 U. S. 365.

In this case there was no question of a privilege tax for carrying on the business of interstate commerce; but the city ordinance of East St. Louis provided a property tax of \$100.00 per boat. The City ordinance was worded as though it were a privilege tax, but the decision of the Court was wholly predicated upon the theory that this was a property tax:

57 "The levy of a tax upon vessels or others water-craft, or the exaction of a license fee by the State within which the property subject to the taxation has its situs, is not a regulation of commerce within the meaning of the Constitution of the United States."

Ferry Case, *supra*, 378.

In support of its insistence the Court in the *Ferry Case*, *supra*, cited the *Passenger* cases, 7th Howard, 283:

"The State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by citizens. A state may tax the stages in which the mail is transported, but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce; and yet, in both instances the tax upon the property in some degree affects its use."

It will be noticed that in the above case the Court recognizes the right of the State to tax property, although such property may be

an instrument of commerce. This doctrine seems to have been modified in the later cases, even with reference to the right of the State to tax property which is an instrumentality of commerce; but, as to that right it is unnecessary to make question here, as we shall hereinafter show.

The Ferry case further cites *Transportation Co. v. Wheeling*, 99 U. S. 273:

"This Court sustained a taxation levied by the City of Wheeling upon steamboats used or engaged in navigating the Ohio River between that city and Parkersburg and the Intermediate places on both sides of the river in the states of West Virginia and Ohio; the Company whose property the boats were, having its principal office in Wheeling."

It will thus be seen that although in this East St. Louis Ferry Case, the ordinance under consideration apparently imposed a privilege tax, yet, it was by the Court construed to be a property tax, and upon the express theory that it was a property tax of \$100.00 per boat, the court sustained it.

The distinction we make in this East St. Louis Ferry case, was expressly noticed in *Covington, etc. Bridge Co. vs. Commonwealth of Kentucky*, 104 U. S. 250-280. In the latter case the question before the Court was whether or not the operation of a bridge between two states was interstate commerce. The court held that it was interstate commerce and that the East St. Louis Ferry Case was not in point on the question, because that case involved a property tax while in the *Covington* case there was the question as to the right to regulate the business of carrying on interstate commerce. Referring to the East St. Louis Case, *supra*, it was said:

"It was said that the levying of a tax upon vessels or other water craft, or the exaction of a license fee by the State within which the property subject to the exaction has its situs, is not a regulation of commerce within the meaning of the Constitution of the United States." Obviously the case does not touch the question here involved. Upon the other hand, however, it was held in *Moran vs. New Orleans*, 112 U. S. 69, that a municipal ordinance of New Orleans imposing a license tax upon persons owning and running two-boats to and from the gulf of Mexico was void as a regulation of commerce."

The Supreme Court expressly recognizes the fact that the East St. Louis Ferry Case was decided upon the theory that the ordinance in question was a property tax, and that the State had a right to impose and collect a property tax upon property which had its situs within the State; and when the case was relied upon in the case of *Covington vs. Kentucky*, as authority for imposing a tax for the operation of a bridge on the ground that it was not a regulation of interstate commerce, the Court properly held that it did not touch the questions therein involved. True the East St. Louis Ferry Case incidentally cites *Gibbons v. Ogden*, 9 Wheaton, 1; *Fanning v. Gregoir*, 16 Howard, 534; *Conway v. Taylor*, 1st Black, 403, and in as much as the two latter cases are cited and relied upon by the distinguished Attorney General as authority for the taxing

of the occupation of carrying on inter-state commerce we shall discuss them.

Conway v. Taylor, was decided upon the express theory that:

"The power to establish and regulate ferries did not belong to congress under the power to regulate commerce, but belonged to the states and lay within the scope of that immense mass of undelegated powers reserved by the Constitution to the states."

The above case, including the case of Fanning vs. Gregoir and the earlier Ferry Cases, are based upon a misconception of the language used by Chief Justice Marshall in the case of Gibbons v. Ogden, *supra*. This distinction is expressly made in the late case of Gloucester Ferry Company v. Commonwealth of Pennsylvania, 114 U. S. 169-218.

"In Gibbons v. Ogden (9 Wheat., 203) Chief Justice Marshall said that laws respecting ferries, as well as inspection laws, quarantine laws, health laws regulating the internal commerce of the States, are component parts of an immense mass of legislation, embracing everything within the limits of the state not surrendered to the general government; but in this language he plainly refers to ferries entirely within the State and not to ferries transporting passengers and freight between the states and a foreign country."

60 Conway v. Taylor and Fanning v. Gregoir, clearly proceeded upon an erroneous conception of the language of Chief Justice Marshall; and upon the erroneous idea that there was something peculiar in ferries, which placed them in the category of inspection laws, quarantine laws and health laws, which take them out of the general rule and place them in a category by themselves amongst "that mass of undelegated powers reserved by the States and never delegated to Congress." In so far as these early Ferry cases proceed upon that theory, and if the East St. Louis Ferry Case be construed to be predicated upon the theory that a State has the right to tax the occupation of carrying on an interstate ferry, these earlier cases have, by application, been overruled in the late case of Gloucester Ferry Co., v. Commonwealth of Pennsylvania.

"It is true that from the earliest period in the history of the Government, the states have authorized and regulated ferries, not only over waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects the states can more advantageously manage such interstate ferries than the General Government; and that the privilege of keeping a ferry, with the right to take toll for passengers and freight, is a franchise grantable by the State, to be exercised within such limits and under such regulations as may be required for the safety, comfort and convenience of the public. Still the fact remains that such ferry is a means and a necessary means—of commercial intercourse between the states bordering on their dividing waters, and it must therefore be conducted without imposition of the States of taxes or other burdens upon the commerce between them, freedom from such imposition does not, of course imply exemption from reasonable charges as compensation for the carriage of persons in the way of tolls or fares, or from the ordinary taxation to which other property

61 is subjected, any more than like freedom of transportation on land implies exemption * * * However great her power, no legislation on her part can impose a tax on that portion of interstate commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on.

"It follows that upon the case stated the tax imposed upon the Ferry Company was illegal and void."

This latter case, while recognizing the right of the State to tax ferry boats or other property which has its situs within the State, by implication expressly points out the error in the earlier Ferry cases which were predicated upon a misconception of the language in *Gibbons v. Ogden*, and of the *E. St. Louis Ferry Case*, if the latter case be construed as having turned upon the theory that a State has the right to tax the occupation of carrying on an interstate ferry as distinguished from the property used in that occupation.

In *St. Clair County v. Intersate S. & C. Co.*, 192 U. S. 407, the Court discusses fully the Ferry Cases hereinbefore referred to; and while it did not find it necessary to pass upon the question here involved, it apparently noticed the fact that these earlier Ferry Cases have been modified;

"We must not be understood as deciding that that doctrine which undoubtedly finds support in the opinion announced in *Fanning v. Gregorie and Conway v. Taylor*, has not been modified by the rules subsequently laid down in the *Gloucester Ferry* and the *Covington Bridge* cases. As this case has not required us to enter into these considerations, we have not done so."

62 If it be conceded that *Fanning v. Gregoire and Conway v. Taylor*, cited in the *E. St. Louis Ferry Case*, and in the brief of the distinguished Attorney General in this case are in point, the doctrine therein announced has been substantially modified by the latter *Gloucester Ferry* and *Covington Bridge* cases; and the *East St. Louis Ferry Case*, mentioned in the *Logan Case* has been expressly distinguished by the Supreme Court of the United States according to our insistence, to-wit: the Supreme Court in that case construed the ordinance in question as a property tax and not an occupation tax, and predicated its decision upon the right of a State to tax property. But if it be insisted that the *East St. Louis case* goes further, then it has been expressly modified by the *Covington Bridge case* and the *Gloucester Ferry Case*, and *Moran v. New Orleans*, *supra*.

But, admitting, *arguendo*, that the earlier Ferry Cases have not been overruled or so distinguished and modified as to be a little force, these earlier Ferry cases proceeded on the theory that the right to control ferries was a peculiar right which, differing from the right to control all other interstate commerce avocations and businesses, the state had never surrendered to the Government. Ferries are expressly classed with quarantine laws, inspection laws, etc. Even at the present time the right of a State to subject interstate commerce to inspection is well recognized. Also the right to subject certain classes of interstate commerce to quarantine laws; but

these are exceptions to the general rule. Except in these particular
 63 and excepted cases, the courts have uniformly held that States
 cannot regulate or control interstate commerce. It has uni-
 formly been held that a State cannot tax the occupation of
 carrying on interstate commerce. The reasoning in the earlier
 Ferry cases is not strong. These cases are predicated upon the
 theory that there is something peculiarly inherent in ferries, dis-
 tinguishing them from other interstate avocations and businesses.
 That by reason of some peculiarity of the law, or something peculiar
 to themselves, the right to control these ferries, being an exception
 to the general rule, was reserved by the states to themselves and
 never delegated to congress. That the occupation of carrying on
 an interstate ferry, although it may be as much interstate commerce,
 as a matter of fact, as the operation of a railroad between two states,
 because of this inherent peculiarity of ferries, and because it is a
 ferry, is excepted from the general rule that Congress shall have the
 power to regulate interstate commerce. These earlier ferry
 64 cases cannot be harmonized with the later holdings involving
 the interstate commerce question, except upon the theory
 that there is something peculiar to ferries which takes them out of
 the general rule. Or, unless they be construed as holding, as in
 the *Ex. St. Louis Ferry* case, that the tax was a property tax and
 not an occupation tax. In conclusion, the *East St. Louis Ferry Case*
 simply holds that a State has the right to tax property even though
 it be an instrumentality of interstate commerce where such property
 has its situs within the State. Or, if it goes further and follows the
 doctrine announced in *Fanning v. Gregorie*, and *Conway v. Taylor*,
 it is by implication overruled by those cases in the *Covington*
Bridge and *Gloucester Ferry Cases*, and is no longer authority, for
 the right to tax even the occupation of carrying on an interstate
 ferry; or, if it be held that these Ferry cases have not been over-
 ruled, the application of the principles announced has not been and
 is not to be extended beyond actual ferry cases.

In *Logan v. Brown*, the Court said:

"There is no direct averment in the stipulation of facts that com-
 65 plainant has not heretofore made sales in Tennessee."

That being the case, it was not necessary for the Court to go
 further. The agreed statement of facts in that case sets out the
 fact that *Logan* had taken out and paid for United States
 65 Revenue license. That was prima facie evidence that he
 was a wholesale liquor dealer within the meaning of the Act
 of 1909. Having admitted that fact, under the express provisions
 of the Act, it was necessary for him to show that he had not made
 sales in Tennessee. He failed to show that and the Court properly
 held upon the prima facie case made out by the fact that he had
 taken out Federal license that he was a liquor dealer within the
 meaning of the Act and subject to the tax. That ended the lawsuit.
 It was unnecessary for the Court to go further. And, while the Court
 did discuss other questions in the *Logan* case this discussion, under
 the well recognized rule of law, that a case is only authority for the
 express question, decided, was dictum:

The next case relied upon by the distinguished Attorney General

and mentioned in the Logan case, *supra*, is: *Nicklen v. Taxing District*, 145 U. S., 1:

In this case certain brokers in Memphis who contemplated doing a business for local as well as foreign principals took out a license in Memphis, paying a certain sum in cash and by bond obligated themselves to pay certain other sums. The Court in that case did not hold that the business done under the facts in that case for non-resident principals was not interstate commerce, but held that inasmuch as these parties for a valuable consideration (to-wit, the "privilege" granted them) having obligated themselves to
 63 pay certain sums by bonds would not be permitted to breach their contracts simply because they had no availed themselves of the privilege granted them. That this was the theory upon which the *Nicklen* case turned is expressly recognized in *Stockard v. Morgan*, 185 U. S. 35, in which latter case the Court calls particular attention to the following paragraph in the *Nicklen* case:

"We agree with the Supreme Court of the State that the complainants having taken out a license under the law in question to do a general commission business, and having given bond to report their commissions during the year and to pay the required percentage thereon, could not, when they applied for similar license for the ensuing year, resort to the Courts because the municipal authorities refused to issue such license without the payment of the stipulated tax. What position they would have occupied if they had not undertaken to do a general commission business and had taken out no license therefor, but had simply transacted business for non-resident principals, is an entirely different question which does not arise upon this record."

It will be noticed in the above paragraph that the words "general commission business", as used therein, were used to distinguish the joint local and interstate business from a strictly interstate business. The Court in using the term "general" clearly meant business both interstate and local as distinguished from strictly interstate business.

The *Stockard* case, *supra* pages 36 and 37, in discussing the *Nicklen* Case, expressly and clearly distinguishes the theory upon which the decision in the *Nicklen* case was predicated:

"In *Brennan v. Titusville*, 153 U. S., 289, * * * In speaking of the distinguishing features of the *Nicklen* case, Mr. Justice Brewer in delivering the opinion of the Court in *Brennan v. Titusville*, said at page 307, * * * in other words, the tax
 67 imposed was for the privilege of doing a general commission business within the state, and whatever were the results pecuniarily to the licensees or the manner in which they carried on business, the fact remained unchanged that the State had for a stipulated price, granted them this privilege. It was thought by a majority of the court that to release them from the obligation of their bonds on account of the accidental results of the year's business was refining too much, and that the plaintiffs who had sought the privilege of engaging in a general business should be bound by the contracts which they had made with the state therefor."

Mr. Justice Brewer hits the keynote of the ground upon which the decision in the *Ficklen* case was sustained. In that case the

parties had, in advance, made a part payment to the State of a stipulated sum of money for the privilege of carrying on a business; and as a further consideration had by bond agreed to pay the State a certain sum of money, the amount of which was to be determined by the business done by them. The question was not whether in the first instance the State could have compelled them to take out a license, or have imposed a privilege tax upon them, but whether, having entered into a contract—having taken out a license and by contract bound themselves to pay for the same, they could later, because they failed to take advantage of the privilege granted them, defeat the obligation of their contract. We respectfully insist that the Ficklen case goes no further. The state for a stipulated price granted the parties in that case a privilege; in consideration of the granting of that privilege they agreed to pay the State a certain sum in cash and an additional sum which was to be arrived at by the gross business done by them. The court properly held that

68 the State having fully complied with its contract the licensees were compelled to comply with their contract and pay what they had agreed to pay. Interstate commerce had nothing to do with the question. The case is somewhat analogous to that of a retail liquor dealer, who, conceiving the idea that he desires to enter the liquor business, takes out a license, pays the State therefor, but after taking out the license and paying the State for the same, changes his mind and decides not to enter into the liquor business. Could it be supposed that he could sue back and recover the money that he had paid? In the latter case he contracted for a privilege; he got what he contracted for and of course he could not rescind his contract. But, to give an example more nearly similar to the Ficklen case, supposing that a party contemplating entering the retail business took out a license, paid part in cash and gave bond to pay the remainder, or executed his note for the same. Having entered into a valid contract with the State, having received exactly what he contracted for, to-wit, the privilege, could it be supposed that because he chooses not to exercise that privilege he could defeat the suit of the State upon that bond, or upon that note? Or, supposing having for a stipulated price received a license and agreed to pay therefor, he elected not to avail himself of the privilege granted and did strictly an interstate business (as in the Ficklen case) could any court hold he could rescind his valid contract simply because he did not care to use the thing he purchased? As well

69 might a man purchase an Automobile and then attempt to rescind his contract because he did not care to use it. The Ficklen case holds that and nothing more. This was the exact distinction which the Supreme Court in the Stockard case recognized as having been made in the Ficklen case. Had the licensees in the Ficklin case, as stated in that case, never *been* taken out a license and never obligated themselves to pay for a license, and then confined their business strictly to making sales for non-residents—strictly to an interstate business—that would have been, as stated in the Ficklen case, “an entirely different question which does not arise upon this record.”

If, however, the construction insisted upon by the Distinguished Attorney General be given the Ficklen case, then that case has been expressly overruled in the case of Stockard v. Morgan.

In the latter case the facts are almost identical with the facts in the Ficklen case. Stockard and others were residents of Hamilton County, Tennessee and had been carrying on business in Chattanooga, Hamilton County, Tennessee, from 1897 to 1900. These parties solicited orders or made sales for non-resident parties, firms and corporations, and when such orders were obtained sent them to non-resident principals. If the orders were accepted the goods were shipped by the non-resident principals to the local jobber or wholesale dealer. It will be seen that the facts in the Stockard case are parallel with the facts in the Ficklen case, with the single exception, that in the Stockard case, Stockard had not taken out a license—had not contracted in consideration of the granting
70 of a privilege to pay any money and had not represented any local principals. In the Stockard case the Court held that Stockard et al. were engaged in the occupation of carrying on interstate commerce and that the State could not tax that occupation.

The distinction attempted to be made by the learned Attorney general is not sustained by the case. The Court in its opinion does mention the fact, it is true, that a State cannot levy a tax or impose other restrictions upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such states before they are introduced therein; but a careful reading of the case will show that the real theory upon which the decision was predicated was not that the tax upon Stockard was a tax upon non-resident principals, but that the tax upon Stockard was a tax upon the occupation of carrying on interstate commerce. In the Stockard case at page 37, the Court say:

"That such a tax amounts to an invasion of the commerce clause of the Constitution of the United States is held in *Stratford v. Montgomery*, 110 Ala. 619, 20 So. 127, in a most satisfactory opinion by Chief Justice Bricknell. In speaking of the tax under the Alabama statute, he said, (p. 628, So. p. 129): 'While, as we have shown, the business of the defendant was general, so as to constitute him a broker, it by no means follows that it required he should also take local business. He might, as he did, confine himself to interstate business and still be a "broker" without becoming liable to the tax.' The statute of Alabama is similar to the one in Tennessee, and the facts in the above case are almost identical with those agreed upon herein."

71 As stated in *Stratford v. Montgomery*, 110 Ala. *supra*, while the business of Stockard might have been such as to bring them within the definition of "brokers" within the Tennessee Act, it by no means followed that they had to do a local business, and until they did a local business, not having taken out, and not having contracted for a license, they were not liable for the privilege tax.

We shall, however, discuss the right of a State to tax the occupa-

tion of carrying on interstate commerce later. For the present we respectfully insist with reference to the Ficklen case:

1st. That the Court predicated its decision upon the fact that the parties had by bond contracted to pay certain sums of money, the amount of which was fixed in proportion to the business done, and that having for a valuable consideration contracted for a privilege they will not be permitted to rescind that contract simply because they had not chosen to exercise it.

2nd. If any other construction is placed upon the Ficklen decision and especially the one insisted upon by the Attorney General in his brief, following the construction apparently placed upon it by this Court arguendo, in its opinion in the Logan case, then the Ficklen case has been overruled by the Brennen case, supra, and by the Stockard case, supra.

In either event, the Ficklen case is not authority in the Logan case or in the case at bar.

The next authority cited in the Logan case is *Woodruff v. Parham*, 8 Wallace, 123, decided in 1868.

72 The sole question in that case, as stated by the Court at page 147 was:

"Whether the merchandise brought from other states and sold under the circumstances stated comes within the prohibition of the Federal Constitution, that no state shall without the consent of Congress levy any impost duties on imports or exports."

No question was made in that case as to interstate commerce. It was not insisted that the tax attempted to be collected was a burden upon interstate commerce. The interstate commerce clause of the Court turned upon the question as to whether or not goods so brought into the State "were imports" within the meaning of the import and export clause of the Constitution. The case simply holds that such were not "imports" within the meaning of that clause of the Federal Constitution.

In *Brown v. Houston*, 114 U. S., 622-335, the distinction we are making is expressly recognized:

"It was decided by the Court in the case of *Woodruff v. Parham*, (supra) that the term "imports" as used in that clause of the constitution which declares that 'no state shall, without the consent of Congress lay any impost or duties upon imports or exports' does not refer to articles carried from one state into another, but only to articles imported from foreign countries."

In *Brown v. Houston*, supra, the Court continues:

"It is unnecessary, therefore, to consider further the question raised by the plaintiffs in error under their third assignment of errors, so far forth as it is based on the assumption that the tax complained off was an impost or duty on imports."

73 And again:

"But in holding that the decision in *Woodruff v. Parham* (supra), that the goods carried from one State to another are not imports or exports within the meaning of the clause which prohibits a state from laying any impost duty on imports or exports, we do not mean to be understood as holding that a State may levy im-

port or export duties on goods imported from or exported to another State. We only mean to say that the clause in question does not prohibit it. Whether the laying of such duties by the State would not violate some other provision of the Constitution that, for example, which gives to Congress the power to regulate commerce with foreign nations among the several States and with the Indian tribes, is a different question".

The Supreme Court of the United States has expressly recognized the fact that the *Woodruff v. Parham* case, cited in support of *Logan v. Brown*, did not turn upon the question of interstate commerce, but was limited to the single question as to whether or not goods so brought into the State were imports" within the meaning of the import and export clause of the Federal Constitution.

Except in so far as the *Brown v. Houston* case serves to distinguish *Woodruff v. Parham* and in so far as it is in harmony with the great line of authorities holding that a State cannot tax interstate commerce, it is not in point in the *Logan* case, nor in the case at bar, nor does it sustain the insistence of the Attorney General. In that case the facts are these: Certain coal was sent by the owners in Pennsylvania to their agents in New Orleans to be sold there for their account. This coal became at rest in New Orleans. It became a part of the general property of the State and was, of course subject to the general property tax of that state. We concede that after property has once become at rest in a state, it is subject to property tax in that state, or any other kind of taxation the state may under her own constitution impose on it. This case simply holds that when property has come at rest in a state it ceases to be interstate commerce and becomes a part of the general property of the state and as such may be subject to the state property tax.

In the *Logan* case there was no question of property coming at rest in the State, nor is such a question raised in the case at bar. On such property appellees have paid the full ad valorem tax. The question in the case at bar is not one of property tax but occupation tax.

American Stetl & Wire Co. v. Speed, 192 U. S. 500, and *General Oil Co. v. Crain*, 209 U. S. 211, simply hold that a State may tax property which has come at rest within the State; or subject such property to inspection or regulations.

In conclusion, on these cases:

Woodruff v. Parham, supra, is not in point, as it simply decides that goods imported from one state into another are not imports within the import and export clause of the Federal Constitution.

Brown v. Houston, *American Steel & Wire Co. v. Speed* and *General Oil Co. v. Crain*; simply hold that property which has come at rest within the State ceases to be interstate commerce and may be subjected to a State property tax.

We now take up:

Cargill v. Minnesota, 180 U. S., 452.

We think a careful investigation of this case and comparison with the *Logan* case, and with the case at bar, will

show that no question of interstate commerce was involved in that cause. We conceded, for the purpose of this cause, at the outset, that the State may tax the instrumentalities of commerce. In the Cargill case, the wording of the state statute providing for the tax is as follows:

"Sec. 1. All elevators and warehouses in which grain is received, stored, shipped or handled, and which are situated * * * are hereby declared public elevators and shall be under the supervision and subject to the inspection of the Railroad & Warehouse Commission of the State of Minnesota, and shall for the purposes of this Act be known and designated as Public country elevators or country warehouses. * * *

Such warehouses were required to take out a license. A careful reading of the statute will show that the thing taxed the warehouse taxed, is defined to be an elevator or warehouse in which grain is received, stored, shipped or handled, the words "received, stored, shipped, or," etc., being used in the disjunctive. In short, any warehouse, under that statute, which receives grain, or stores grain, situated as was that warehouse, was clearly liable for the tax. It was not necessary for the warehouse to ship grain in order to come within the provisions of the statute. In that case the owner of the warehouse purchased grain from residents of Minnesota. He received this grain at his warehouse and stored it there. Nothing further was necessary to bring him within the terms of the statute. True, he also sold his grain to non-residents of Minnesota, but the statute did not tax the business of a grain merchant, or the business of selling grain. It was a warehouse tax pure and simple, upon all persons who in a particular kind of warehouse received or stored

grain. We concede that in so far as the interstate commerce clause of the Federal Constitution is concerned if

76 Tennessee had provided by an Act of her Legislature that all persons who received and stored liquor in warehouses should first take out a license therefor, the question of interstate commerce would not be involved. In the Cargill case it was said:

"It was conceded on the argument and is fairly to be inferred from the findings and stipulation of facts that the grain is purchased, weighed, graded and delivered at the warehouse, and that defendant, with its own scales and appliances, weighs and grades the grain. Under these circumstances the warehouses are a sort of public market place where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as marketmaster, weighmaster, inspector and grader of the grain. Surely such a business is of a public interest and is sufficiently affected with a public interest to warrant a very considerable amount of regulation of it by the State".

It might be noticed here that even in that case the Supreme Court of Minnesota held that there might be some question as to its right to regulate the warehouse if the defendant did nothing more than store his own grain. And in the case at bar how could the simple storing of appellees' own property affect the public.

But the statute in the Cargill case was simply a privilege tax placed upon warehouses operating in the State of Minnesota. The

statute involved in the Logan case, and in this case, is not a tax upon operating a liquor warehouse—not a tax upon the business of receiving and storing liquors—as was the statute of Minnesota, the

defendant in that case having received grain from residents of the state and stored the same—but is a tax upon the business of selling liquors—under the express wording of the statute, and under the insistence of the Attorney General, it is a tax upon the business of selling liquors—and as the only sales made by the appellees are interstate commerce, under the Kelly case, it is a tax upon the business of making interstate commerce sales.

The Cargill case turns upon the point that the business so operated,—that the thing taxed was not an interstate business, because, under the statute, it consisted solely in receiving grain from residents of Minnesota, and in storing grain in a warehouse within the state. The statute did not tax the sale of grain or declare the sale of grain a privilege:

“The statute puts no obstacle in the way of purchase by defendant company of grain in the state, or the shipment out of the state of such grain as it purchased. The license has reference only to business of defendant at its elevator or warehouse. The statute only requires a license in respect to business conducted at an established warehouse in the State, between the defendant and the sellers of the grain.”

It will be remembered that in the Cargill case the grain was purchased by defendant from residents of the State if Minnesota, and therefore the business was conducted, “between the defendant and the sellers of the grain”, was local or intrastate business. Had the statute gone further and laid a tax upon the storing and sale and had defendant in the Cargill case been engaged in making interstate commerce sales alone, we submit that he would have come within the protecting clause of the Federal Constitution.

In *Kidd v. Pearson*, 128 U. S. 1, cited by the Attorney General in his brief, the exact distinction we seek here to make, was made.

Our proposition is that in the Cargill case, although storing or shipping were the words used in the statute, these words were used in the disjunctive, so that a doing of either one of those things brought the defendant within the statute. In short, if he received grain and stored it in his warehouse, he was within the statute, whether he shipped it or not. It was not necessary for him to ship the grain to be within the statute. Had the statute declared the shipping of grain an occupation and defendant's business consisted solely in storing and shipping grain, he would have been within the protection of the Interstate Commerce clause of the Constitution. In *Kidd v. Pearson*, it was said:

“Here, then, is, first, a sweeping prohibition against, not the manufacture and sale, not a dealing which is composed of both steps, and consequently must include manufacture as well as sale, or e converso, sale as well as manufacture, in order to incur the denunciation of the statute, but against either the sale or the manufacture. The conjunction is disjunctive. * * *”

And again:

“Manufacture is transformation—the fashioning of raw material

into a changed form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce."

Had the statute acted upon the manufacture and sale, and transportation, the Court clearly indicates that the statute would have been violative of the Constitution.

So, in the Cargill case, the statute operating upon the receiving or storing, and as the word "or" was used instead of "and," the shipping, is not necessarily taxed. The Cargill case is in entire harmony with Kidd v. Pearson. A warehouse may be an instrumentality of commerce, but it is not commerce itself. "The buying and selling and the transportation incident thereto constitute commerce."

In the Logan case and in the case at bar, it is not the storing of liquors that is taxed—we concede that even though the liquors might have been, or may in future be used in interstate commerce, the storing of liquors does not constitute interstate commerce any more than does the manufacture of liquors constitute interstate commerce, but the Act of 1909 defines the privilege taxed as the business of "selling" liquors; that is what in Kidd v. Pearson is held to constitute interstate commerce; "The buying and selling * * * constitute commerce"; and of course, when that selling is interstate, it constitutes interstate commerce.

And now, having discussed at some length every case cited in the Logan v. Brown case, we conclude as to these cases with placing the same under the following heads:

1st. Conway v. Taylor and Fanning v. Gregorie, have been modified by the latter Gloucester Ferry and the Covington Bridge cases. The holdings in the earlier cases was predicated upon a misconception of the language of Chief Justice Marshall. They are in conflict, as we shall hereinafter show, with the adjudicated cases involving all other occupations. If not modified by the Gloucester Ferry case and the Covington Bridge case, the application of the earlier ferry cases is not to be extended beyond ferries. In either event, these cases are not in point, and need not further be noticed.

80 The E. St. Louis Ferry Case, simply holds that a state may tax property which has its situs within the state. While this construction has been expressly placed upon it by the Supreme Court as hereinbefore shown, if it be construed to go further, it too, has been overruled by the latter ferry cases; and if it should be held that it has not been so overruled by implication; then the application of the reasoning therein should not extend beyond ferry cases, and it should be classed with Fanning v. Gregorie, and Conway v. Taylor, as not being in point in the case at bar.

3rd. Woodruff v. Parham simply construes the import and export clause of the Federal Constitution, does not touch the interstate commerce question, and hereinbefore shown is not in point.

4th. American Steel & Wire Company, etc. v. Speed; General Oil Co. v. Crain, and Houston v. Brown, (except in so far as the latter case distinguished Woodruff v. Parham and recognizes the general principle that interstate commerce can not be taxed) simply hold

that the State may impose a property tax upon interstate commerce which has come at rest within the State.

5th. The Ficklen case turns upon the principle of contract, and simply holds that where a man has contracted for and agreed to pay for a privilege he cannot rescind the contract because he chooses not to exercise the privilege. Stockard v. Morgan expressly draws this distinction and any other construction placed upon that case brings it into conflict with the latter Brennen case and Stockard v. Morgan. Hence, in either event, the Finkler case is not authority in the case at bar.

6th. The Cargill case is not in point.

While the decision of the Court in the Logan case turns upon the fact that Logan had failed to show that he had made no local sales, and of course all other matters were dicta the Attorney General seems to infer that the Court meant to predicate its opinion upon the principle announced in the E. St. Louis Ferry case, and sustain the right of the State to tax appellees, upon the theory that the tax in question is a property tax imposed upon property which has its situs in Tennessee, or following the Houston v. Brown; American Steel Wire etc. v. Speed, and that class of cases, that the tax ought to be collected was a property tax imposed upon property which had come at rest within Tennessee.

For this reason, we shall briefly discuss the question on this theory:

We concede the right of the State to impose a property tax upon property, although it may be sued in interstate commerce, which has its situs in Tennessee, or which has come at rest in Tennessee. Appellees, however, have paid the full property tax assessed against them in Tennessee.

However, under no circumstances can the \$500.00 privilege tax and \$500.00 County tax imposed by the section in question of the Act of 1909, be sustained as a property tax. The Constitution of the State of Tennessee provides:

"Art. 1, Sec. 28. All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct do that taxes shall be equal and uniform throughout the State. No one species of property from which a tax shall be collected shall be taxed higher than any other species of property of the same value. * * * The portion of a merchant's capital used in the purchase of merchandise sold by him to con-residents and sent beyond the State shall not be taxed at a higher rate than the ad valorem tax on property."

All property whether used in interstate commerce, but having its situs in Tennessee, or whether having been a part of interstate commerce, and come at rest within the State of Tennessee, must be taxed in an equal and uniform manner throughout the State. Property of this character is construed to be merchandize and subject to the merchants' ad valorem tax. To hold that this tax is an additional property tax, imposed upon the property of appellees, would be at once to declare this a tax levied in violation of the express *term* of the Constitution of the State of Tennessee. There is a

wide distinction in Tennessee between the right of the state to levy a privilege tax and its right to levy a property tax. As to property, it must tax all property equally, according to its value; as to privileges, the power of the Legislature is unrestricted and it may do, as it has done by the Act of 1909, impose a confiscatory tax upon privileges, and yet be within the provisions of the State Constitution.

83 With these principles the Court is too familiar to need authority, but in passing we quote from one case in which the distinction is expressly made:

Speaking of these provisions of the Constitution the Court say: "Its meaning is, that although in taxing property the Legislature is forbidden to tax it, except according to its value, yet as to merchants, peddlers and privileges, the Legislature is not to be restricted, but may exercise the taxing power without restrictions, either as to amount or as to manner or mode of exercising the power."

Jenkins v. Erwin, 8 Heiskell, 487.

While we are not certain that such is his intention, yet, the Attorney General seems to attempt from the ambiguous wording in the Logan case to draw a distinction between the taxation of interstate commerce, and the taxation of the occupation of carrying on interstate commerce. If such is his intention, in this he is in error. The State cannot tax the occupation of carrying on interstate commerce. This is no longer an open question. In *Cruther v. Commonwealth of Kentucky*, 141 U. S. 58, it was said:

"We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 1; *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *Leloup v. Port of Mobile*, 127 U. S. 640; *Asher v. Texas*, 128 U. S. 129; *Stoutenberg v. Hennick*, 129 U. S. 141; *McCall v. California*, 139 U. S. 104. * * *"

As a summation of the whole matter it was aptly said by the present Chief Justice in *Lyon v. Michigan*, 135 U. S. 161, 168:

84 "We have repeatedly held that no State has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from the transportation, or on the occupation or business of carrying it, for the reason that taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress."

It will thus be seen that the occupation of carrying on interstate commerce is interstate commerce and as a necessary corollary, if a State cannot under its police power interfere with interstate commerce, it cannot interfere with the occupation of carrying it on.

The State under its police power cannot tax the occupation of carrying on interstate commerce.

In *State v. Logan*, the Court said:

"First. The liquor traffic is a well recognized subject of police regulation. And the exaction of a license fee from a liquor dealer is an ordinary exercise of police power. A mere levy of an occupation tax upon a liquor dealer * * * cannot be held to be a regulation of commerce between the states."

As has heretofore been shown in the Logan case, under the facts of that case, Logan did a local business. The Court was bound to find that he did a local business, because he admitted he had taken out a Federal license, which under the Act of 1909 was *prima facie* evidence that he was a local dealer and there was nothing in the record to rebut or overturn the *prima facie* case thus made. The Court being bound to adjudicate him a local dealer,—never reached the interstate question and, hence, this part of the Court's decision is

dictum. But, clearly, the Court could not have intended that the language there used would be construed as giving the State the right under its police power to regulate the occupation of carrying on interstate commerce. It was bound to find that Logan was a liquor dealer whatever the reasoning upon which the Court predicated its opinion, but it clearly went no further.

In *Kelly v. State*, 123 Tenn., 563, this Court in discussing the question as to the extent of the right of the State in the exercise of its police power says:

"It is also said, however, that whenever the State police power and the National Commerce power come into conflict, the former must yield."

And again:

"The United States has recognized intoxicating liquors as the proper subject of commerce."

And again:

"It is impossible, therefore, for the State to prevent such sales of this product as are made within the protection of the Interstate commerce clause of the Federal Constitution."

Numerous cases are reviewed and cited in support of this opinion. And again at page 568 it is said:

"The Wilson law, however, does not touch the case presented by the special facts set forth in the indictment under consideration. That act has reference only to intoxicating liquors brought into the State. The case before us is one where in it appears that the liquors were sent out of the State."

On page 575 of the same opinion, the Court says:

"It is again insisted, as on the former hearing, that the indictment should be sustained under the police power. This Court has always upheld the police power of the State with the strong hand; but we cannot accomplish the impossible task of making that power operative in the face of the Constitution and laws of the United States."

It is thus well settled both in this State and in the United States that a State, even under its police power, cannot regulate or burden interstate commerce. And hence, of course in the exercise of that police power—and under and by virtue of it, it cannot lay a tax upon interstate commerce, or the occupation of carrying on interstate commerce.

The Attorney General apparently contends that the question as to whether or not an occupation is interstate commerce depends upon the point from which the occupation is carried on—in short, he seems to insist that while a resident of New York may sell in Tennessee and come within the protecting clause of the Federal Constitution, a resident of Tennessee cannot sell in New York and come within that clause. In the case of *State v. Kelly*, supra, we understand a similar insistence was made, that is, that while a sale for shipment from a foreign State into Tennessee was interstate commerce, a sale from Tennessee for shipment into such foreign State was not interstate Commerce. In that case the Court held that a sale for shipment out of the State was interstate commerce.

In *Moran v. New Orleans*, 112 U. S., 65, (which, in passing, it may be noted, expressly overrules the early ferry cases, and makes the distinction we contend should be made in the *E. St. Louis Ferry Case*, to wit: that while a State may impose a property tax upon property used in interstate commerce, it cannot impose a privilege tax upon the occupation of carrying it on). Certain residents of New Orleans, who had duly enrolled their vessels at New Orleans, that point being the situs of their business and property, 87 were sued by the City of New Orleans to recover a license tax provided by the City ordinance in the following language:

"An ordinance to establish the rate of license for professions, callings and other businesses for the year 1880.

39. Every member of a firm or Company, every Agency, person and corporation owning and running tow boats to and from the Gulf of Mexico, \$500.00."

The business of defendants in that case was as follows:

"Joseph Cooper was the owner of two steam propellers, each measuring over one hundred tons duly enrolled * * * employed them as tow boats in taking vessels from the sea up the river to New Orleans and from that port to the Sea."

It will thus be seen that the situs of his property to wit, the two towboats, was at New Orleans; his business was operated from that point into a navigable stream and the gulf of Mexico. Upon these facts the Court held that while his property, to wit: the two tow boats, having its situs within the City of New Orleans was subject to a reasonable property tax, his occupation, which, of course also had its situs there, was that of carrying on interstate commerce and that he was within the protection of the Federal Constitution.

"But, it is undoubtedly true, as it has often been judicially declared, that vessels engaged in foreign and interstate commerce and duly enrolled and licensed under the acts of Congress may be taxed by State authority as property. * * *

"But the license fee in the present case is not a tax upon the boats as property, according to any valuation. The very law authorizing its imposition declares that it shall not be construed to be a tax on property.

"It is said, however, to be a tax on an occupation and for that reason not a regulation of commerce. * * * The state thus seeks to burden with an exaction fixed at its own pleasure the very

right to which the plaintiff in error is entitled under and which he derives from the Constitution and laws of the United States."

88 And the Court held the tax void.

In the recent case of Addyston Pipe & Steel Co. v. U. S. 175, U. S. 213—The Pipe Trust Case—the Court, among other things, said:

"The direct and immediate result of the combination was, therefore, necessarily, a restraint upon interstate commerce in respect to any of the articles manufactured by any of the parties to it to be transported beyond the State in which they were made. The defendants by reason of this combination and agreement, could only send their goods out of the State in which they were manufactured for sale and delivery in another State, upon the permission and pursuant to the provisions in said combination. As pertinently asked by the Court below, was this not a direct restraint upon interstate Commerce in these goods?"

And again,

"A sale for transportation beyond the State makes the transaction a part of interstate commerce."

In the last case the Court defined Interstate Commerce as follows:

"As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens and inhabitants of different States, and includes not only the transportation of persons and property in the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities."

In Adams Express Company vs. Iowa, 196 U. S. 133, Mr. Chief Justice White delivered the opinion of the Court and referring to the long line of interstate liquor cases, Bowman v. R. R. Leisy v. Hardin; Rhodes v. Iowa and Vanee v. Vandercork, he says:

"Those cases rested upon the broad principle of freedom of commerce between the States, and of the right of a citizen of one State to freely contract to receive merchandise from another State and of the equal right of the citizen of a state to contract to send merchandise into other States."

89 Numerous authorities might be cited on this point, but it seems to us an elementary proposition, that is a man be engaged solely in the business of making interstate sales, and transacting interstate commerce—it will be noticed we use the word solely—that then it can make no difference whether he operates from his own state into foreign states — into his own state. The direction in which he carries on interstate commerce is immaterial. If a citizen of Tennessee as held in the Kelly Case, sells to a non-resident that act is interstate commerce. If a non resident sells to a citizen of Tennessee, that act is interstate commerce. In either event, the parties are engaged in the act of carrying on interstate commerce. If either party continue that act,—make a business of making such sales, he is clearly engaged in the business of making sales, as a necessary conclusion, in interstate commerce.

Our next insistence is: "Appellees are engaged in the occupation of carrying on interstate commerce.

At the outset in discussing this question it is necessary carefully to analyze the business at the present time being conducted by appellees. Under the bill it is "as follows and not otherwise".

1st. On January 1st, 1912, they lawfully owned and had in their possession a large stock of liquors:

2d. On that date and since that date they have stored and kept these liquors, except such as they have sold at their warehouses in Chattanooga, Tennessee.

3rd. Since that date they have done business only as follows:

"(a). They solicit and receive orders by mail from citizens and residents of other states for shipment to and delivery into such other states of said liquors.

(b) Upon receiving orders from citizens and residents of other states for shipment as above set out, they manifest their acceptance of such orders by delivery of said liquors from their said places of business in Chattanooga to railroads engaged in interstate commerce for continuous transportation only to points beyond the State of Tennessee and to said purchasers, which said act of delivery closes the contract of sale.

(c) And collect the price of the goods sold by checks and money orders mailed to them from said foreign states either at the time the order is received or after said liquors are received by said purchasers.

It will be noticed in the bills that appellees since January 1st, 1912, have purchased no liquors. That since January first, 1912, they have not broken bulk and assorted their liquors. That the only business done by them is as set out above. Their bills are express in their terms and no inferences in any way contradicting them are warranted.

We shall discuss these phases of the business in the order named:

1st. Appellee owns and has in its possession a large stock of liquors.

Chapter 479 of the Act of 1909 does not declare the ownership of liquors a privilege. Under no construction of the Act could the mere ownership of liquors be construed as coming within its terms. The Act in its face expressly defines liquor dealers as all persons selling liquors. The cases cited in the brief of the distinguished Attorney General defining various occupations are not in point. The statute in this case expressly and in clear and unmistakable terms defines the occupation taxed. But even if it should be conceded that the ownership and possession of liquors is declared a privilege, then such a construction it has been expressly held in Tennessee, contravenes the equal and uniform property tax clause of the State constitution. Property is ownership.

In the case of *Phillips v. Lewis*, 3rd, *Shannon's Cases*, 231, this question was expressly decided. In that case it was held:

First. That dogs are property and may be taxed as such, if taxed according to their value as property.

Second. But they cannot be taxed at so much per head for the privilege of keeping them, regardless of value.

We, therefore, respectfully submit that the insistence of appellants cannot be sustained on the theory that the Act in question taxes the ownership and possession of liquors.

2nd. On that date and since that date they have stored and kept these liquors, except such as they have sold at their warehouses in Chattanooga, Tenn.

Surely the learned Attorney General cannot insist that the tax in

92 question declares the storing of a man's own liquors in his own house a privilege? Supposing that on January first appellees had closed their doors, having on hand these same stocks of liquors; supposing that on January first they determined to quit business and retain their stocks for the use of grandchildren yet to be born. If such a case were to arise, could even the distinguished Attorney General insist that under the Act in question the State could exact and collect a privilege tax for such an occupation? Or, combining the first part of their business with this; supposing that they own and have in their possession and stored in their own warehouse a large stock of liquors with no purpose of selling the same, could it be reasonably insisted that they come within the provisions of the act of 1909? And yet, in his brief, that seems to be the insistence of the Attorney General on this question. He seems to indicate that it is the ownership and possession and storage of these goods in Tennessee that is taxed. Had the Legislature seen fit to do so, it might have declared the ownership and storage of liquors a privilege and the State Constitution out of the way, so far as the interstate commerce clause of the Federal Constitution is concerned, such a privilege tax would be valid; but, this the Legislature has not seen fit to do.

3rd. Since that time they have done business exclusively as follows: (a) They solicit and receive orders by mail from citizens and residents of other states for shipment to and delivery into such other states of said liquors:

Judge Taft in the "Pipe Trust" case, (85 Fed. p. 271, 29 C. C. A. 141) delivering the opinion of the Court, said:

93 "But neither of these cases controls the one now under consideration. The subject matter of the restraint here was not articles of merchandise or articles of their manufacture, but contracts for sales of such articles to be delivered across state lines and the negotiations and bids preliminary to the making of such contracts, all of which, as we have seen, do not merely affect interstate commerce, but are interstate commerce.

In the case of *Robbins v. Taxing District*, 180 U. S. 489, the Court said:

"Negotiations for the sale of goods, which are in another state, for the purpose of introducing them into the state in which the negotiations *is* made, is interstate commerce."

(b) Upon receiving orders from citizens and residents of other states for shipment as above set out, they manifest their acceptance of such orders by delivery of said liquors from their said places of business in Chattanooga to railroads engaged in interstate commerce for continuous transportation only to points beyond the State of Tennessee and to said purchasers which said act of delivery closes the contract of sale.

(c) And collect the prices of the goods sold by checks, and money orders mailed to them from said foreign states, either at the time the order is received, or after said liquors are received by said purchasers.

In 17th Am. & Eng. Encyclopedia of Law, page 85, it is said.

"A state law prohibiting or forbidding transportation out of the

state of an article of commerce is an interference with interstate commerce and is void."

94 As early as 1830, the Supreme Court of the United States, through Chief Justice Taney, declared invalid a statute of California which prescribed a tax upon every shipment of gold made out of the State. This case follows the opinion of Chief Justice Marshall in *Brown v. Moreland*, 12 Wheaton, 419, invalidating a license upon imports.

Almy v. California, 6 U. S. 173.

A statute of Nevada putting a tax on railroad and stage companies for every passenger carried out of the State, was held to be an interference with interstate commerce and void.

Crandall v. Nevada, 73 U. S. —.

A statute of Pennsylvania fixing a tax on railroads according to the amount of freight handled was held unconstitutional as to interstate shipments.

Case of the State Freight Tax, 82 U. S. 291.

After the wonderful supplies of oil and natural gas were discovered in Indiana, that State, no doubt with a laudable desire to preserve this cheap fuel for her own citizens and seemingly for the general welfare, passed an Act making it unlawful to pipe or conduct natural gas from any point in that state to any point without the state. The Court said:

"Natural gas is as much an article of commerce as iron ore, coal, petroleum, or any other of the like products of the earth. It is a commodity which may be transported, and it is an article which may be bought and sold in the markets of the country.

"For the purposes of taxation an article of property may not be regarded as a commercial commodity until it has started on its way from one state to another, but property, that may become an article of commerce cannot be kept in the State where it was produced by a State law forbidding its transportation.

95 "We find no tenable ground upon which the act can be sustained and we are compelled to adjudge it invalid."

Indiana v. Indiana & Ohio Oil, etc. 120 Ind. 586.

The question is, can defendant be taxed for carrying on the business of making sales in other states? There must be a seller as well as a purchaser; their rights in the constitution are identical.

If the State has the right to tax the occupation of selling lawful merchandise for exportation from one state to another, then the state has the power absolutely to destroy interstate commerce. There can be no commerce without sales or negotiations for sales; and as has been expressly held in *Tennessee v. Jenkins v. Erwin*, 8th Heiskell, 478, the State insofar as a privilege tax is concerned:

"May exercise the taxing power without restriction, either as to amount, or as to the manner or as to the mode of exercising the power."

and this is the power to destroy.

At one time soon after the adoption of the Constitution, it was seriously insisted by some of the great lawyers of the country, not that buying and selling was not commerce, but the word "Commerce" was restricted to buying and selling but that it did not include transportation. In the case of *Gibbons v. Ogden*, 9th Wheaton, p. 1 Mr. Chief Justice Marshall in discussing the term "commerce" among the several states," said:—

"The counsel for appellee would limit it to traffic, to buying and selling or the interchange of commodities and do not admit that it comprehends navigation. This would restrict a general term applicable to many objects to one of its significations. Commerce, undoubtedly is traffic, but is is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations, and all its branches and is regulated by prescribing rules for carrying on that intercourse."

And again:

"It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term.

"If this be the admitted meaning of the word in its application to foreign nations, it must carry the same meaning throughout the sentence and remain a unit, unless there be some plain intelligible clause which alters it.

"The subject to which the power is next applied is to commerce 'among the several States', the word 'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior."

In *Gloucester Ferry Co. vs. Pennsylvania*, 114 U. S. 204, the Court said:

"Commerce among the States consists of intercourse and traffic between their citizens, but includes the transportation of persons and property and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities."

In the case of the *State of Tennessee vs. Scott*, 98 Tenn., 254, the question involved was whether the State could tax the business of taking orders for enlarged pictures, where the work was to be done out of the State and brought into the State for delivery. The Court said:

"When this is done by one person upon the order of another, and the larger picture is delivered for a consideration, the parties have certainly had a commercial transaction, and if they be citizens of different States and the picture be made in one state and sent into the other as indicated in the statute and averred in the presentment, the transaction as between the principals, is, as obviously interstate commerce. The latter is a commercial trans-

action between the citizens of different states, and that is what interstate commerce means."

In *Brown v. Maryland*, (12 Wheat., 446):

"Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation but to authorize the importer to sell."

What good will it do appellee to export *its* whiskey if they cannot sell it?

In the case of *McNaughton vs. McGirl*, 38 L. R. A. 367, it was held that the purchase and solicitation of wool by an agent of a foreign corporation, for shipment to other states, was interstate commerce, and that a foreign corporation thus engaged was not subject to a State Law forbidding such corporation from doing business without complying with the conditions imposed upon foreign corporations for doing business within the State.

98 In the case referred to the Court, after reviewing numerous authorities on the subject, said:

"The plaintiff corporation sent its agent into Montana to solicit and buy wool to be sent to its wool houses in other States wherein it does its principal business. The agent did not other kind of business for the corporation in Montana. Such being the case, it seems clear to us his business directly pertained to interstate commerce. It related to intercourse and traffic between Montana and New York and the subject matter of the intercourse and traffic was the wool itself. If the Northern Pacific Railroad in transporting the wool over its road between Montana and Minnesota, was engaged in interstate commerce—as clearly it was—we cannot perceive how the transaction by which the wool itself was exchanged, through consignment or sale by defendant to plaintiff, can be excluded from any reasonable definition of commerce among the states. The sale and exchange of wool is among the great operations of the commercial world. It is, like traffic in cotton, or wheat or corn,—a subject of frequent intercourse between the citizens of different States and different nations. The railroad transportation is a part of the commerce—the instrument or vehicle of intercourse—the wool the essential subject matter of the intercourse and traffic. It being our opinion from what we have said that the plaintiff corporation was engaged in a business which was strictly interstate commerce, no law of the State could control or restrict such commerce by exacting conditions for permitting plaintiff to do such business."

We have heretofore pointed out the distinction in *Kidd v. Pear-*

son, 128 U. S., 1, cited by the Attorney General. The only question in that case was the illegal manufacture. The question of sale was not in the case.

Under the laws of Tennessee, we can only store our liquors in Chattanooga. We cannot sell any of them as contemplated by the Act of 1909. Our business under the allegations or the bill consists solely in negotiating for and entering into contracts of sale with citizens of other states. And in fulfilling these contracts by shipping through an interstate carrier.

In *Adams Express Co. v. Iowa*, 193 U. S. 133, it was stated that in interstate commerce the seller and the buyer were equally protected by the Constitution. The consideration as to where the contract was completed, was held to be "too slender a thread upon which to hang", an exception of the transaction from a rule which would otherwise declare the tax to be an intercourse with interstate commerce.

On the same point we cite *Norfolk & Western R. R. vs. Simms*, 191 U. S. 441; *Adams Express Co. v. Kentucky*, 203 U. S. 229; *Sedgwick vs. State*, (Texas) 85 S. W. 315.

In the case of *United States v. The Knight Company* 156 U. S. 11, the question of the power of the general government under the commerce clause of the Constitution, to enforce the anti-trust law so as to prohibit a combination among manufacturers of sugar, was involved. In that case no sales or contracts for transportation beyond the State line, or any act of interstate commerce was shown. The Court said:

"It is vital that the independence of the commercial power and of the police power and the delimitation between them however, sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States, as required by our dual form of government. And acknowledged evils however grave and urgent they may appear to be, had better be borne, than risk be run in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

And again:

100 "Contracts to buy, sell or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purpose of such transit among the States, or put in the way of transit, may be regulated, but this is because they form a part of interstate commerce."

This case and the case of *Kidd vs. Pearson*, both correctly define the powers of the National government under the commerce clause of the Federal Constitution, and of the several State governments under the reserved police power to correct and control existing evils. Both reach the same conclusion; First, that the police power of the State extends to and controls the manufacture and production of all articles of commerce within the State; and the Federal Government cannot control or interfere therewith. Second: That the commerce clause of the Constitution confers upon the Federal govern-

ment the exclusive power to regulate sales for transportation from one State to another and the several states cannot under the guise of their police power or otherwise, prohibit or in any manner interfere with the same.

In *Addyston Pipe & Steel Company vs. United States*, 175 U. S., 239—the "Pipe Case," it was held a sale for transportation beyond the State makes the transaction a part of the interstate commerce.

We fail to see the force of *General Oil Co. v. Crane*, 209, U. S. 211; and *State v Fitzpatrick*, 13 Rhode Island, 54, as applied by the attorney general in support of his contention. In the first

named case, the Supreme Court of the U. S. decided that oil

101 in tanks in Memphis was the subject of inspection by the State authorities, although it was intended for sale and transportation to purchasers out of this State. It was nevertheless, a part

of the great mass of the State's property and subject to the control of the State, so far as inspection of taxation is concerned. This case did not involve the question as to whether a sale of these goods to citizens out of the State would be an interstate transaction.

The case of *State v. Fitzpatrick*, is a state case and does not involve the question of the right of a citizen of that State to sell to a citizen of another State goods brought lawfully into existence and which he was permitted to keep on hand. The Attorney General assuming that these and similar cases are authority against us, falls into the error so clearly pointed out by Judge Taft in the *Pipe Trust* case, of failing to make distinction between the right of a State to control the production of goods within the State, and to tax goods while in the State, on the one hand, and contracts for the sale of same to citizens of other States on the other hand. The State may control or prohibit the production of liquors, or the storage and keeping of liquors, or it may impose a property tax upon liquors or any other merchandise until the same is actually delivered for transportation out of the State; but our insistence is that a state cannot declare the business of selling liquors in interstate commerce a privilege and tax it as such.

In *Vance v. Vandercook*, 170 U. S., 44, it was said:

"Equally well established is the proposition that the right to send liquor from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the constitution of the United States to Congress; and hence,

102 that State law which denies such a right or substantially interferes with or impairs the same, is in conflict with the Constitution of the United States."

And Again:

"But the right of a person in one State to ship liquors into another State to a resident for his own use is derived from the Constitution of the United States, and does not rest with the grant of State law."

We therefore, respectfully, insist:

1st. That this tax cannot be sustained as a tax upon the ownership of property, or the property of appellees because in violation of the State constitution; and because under the express wording of the Act, such ownership is not taxed. We hardly think that even the

Attorney General will insist that the ownership of liquor in Tennessee is declared to be a privilege.

2nd. The tax cannot be maintained as a tax upon the storing of liquors in Tennessee. To say that the Act of 1909 providing a tax upon all persons selling liquors makes it a privilege to store one's own liquor in one's own house is an absurdity on its face, and indeed it is doubtful whether the storing of property is not such a necessary incident of ownership as brings it within the "equal taxation of property" clause of the State Constitution.

Appellees under the allegations of the bills, have not broken bulk and separated their liquors, but even if they had, we insist that under the wording of the statute that is not taxed.

103 If appellees had purchased liquors, we respectfully insist that the purchase of these liquors is not declared to be a privilege and taxed by the Act of 1909; but on the face of the bill, appellees have not purchased liquors, but since January 1st, 1912, have been engaged solely:

In soliciting orders in foreign states by mail and making interstate negotiations for interstate sales, which has been expressly held to be an incident of commerce and interstate commerce itself. They have received orders, or "bids" for interstate sales and shipments. As we have shown, such orders and bids are interstate commerce. They have exported their goods by interstate commerce, or, in other words, made interstate shipments, which is interstate commerce. In short, while they are engaged in the business of "selling" liquors, and have been since January 1st, 1912, they have been engaged solely in negotiating for interstate sales, making contracts for interstate sales and making interstate shipments. Every part of their business has been interstate commerce, except the ownership of their goods and the storing of their goods, which as has heretofore been shown, are not declared privileges in Tennessee and are not taxed as such. The Act of 1909 defines in its face the privilege taxed. The definition is clear and concise. The Attorney General, as a final conclusion seems to insist that the selling is not a necessary element of the privilege taxed. In other words, according to his contention, if a man should purchase a ten gallon barrel of whiskey, take the same to his house (which would be his warehouse) break bulk and place the same in gallon bottles, for convenience, and keep the same at his house (or warehouse), he would be liable

to the State of Tennessee for a tax of \$500.00 and to the
104 County of Hamilton for a similar tax, although he had never made a single sale, nor intended to make a single sale. Would any court hold on a suit by the State to collect the privilege tax provided by the Act of 1909, that such a man was exercising the privilege therein defined? Supposing that he does this in continuous assiduity—that every month he purchased a ten gallon barrel of whiskey—and we submit the amount makes no difference—carried this in bulk to his house, broke bulk and put it in smaller bottles and sent it out to his friends gratis, throughout the United States, would such a man be liable to the tax in question? What element is it that is wanting to make the privilege complete? Why does the

mind instantly hesitate? What is it in the proposition above that shocks the natural sense of justice? If that same man sold the liquor, would he not be clearly liable under the statute? So far as the State is concerned it is immaterial whether appellees make no sales, or confine themselves to interstate commerce. In either event they make no sales and are not selling subject to the laws of Tennessee. True a man who contemplates entering a business may be required to take out license in advance, but until he has actually exercised the privilege, he cannot be subjected to the penalty for failing to take out the license or held liable for the tax imposed upon the privilege.

What, then, is the privilege defined in the statute?

For the purpose of argument, we may concede even that it consists of everything appellees are now doing—that it takes a combination of all to bring the case within the statute. That the ownership of the liquors, is one part; that the storing of the liquors is
 105 another, and that the negotiations for interstate sales, the making of contracts of interstate sales, and the making of interstate shipments of the liquors is another and necessary part. Even under this theory, we respectfully insist that appellees are within the protection of the Federal Constitution. In *Kidd v. Pearson*, the right of a state to prohibit the manufacture of liquor was involved. The manufacturer insisted that inasmuch as the statute provided that: "no person shall manufacture or sell," he being engaged solely in making interstate sales and these sales being inseparably connected with the manufacture of the liquor, the State could not prohibit the manufacture because of the interstate commerce clause of the Federal Constitution. The Court expressly indicated that if the "manufacture and sale" had been prohibited, the manufacturer would have been under the protection of the Federal Constitution; that is, if the crime defined had been both the manufacture and the sale—if it took both of them to constitute the offense, the fact that one of the necessary parts of the offense was local, would not make the statute valid, where clearly the other necessary part was interstate commerce, the Court said:

"No person shall manufacture or sell * * * directly or indirectly, any intoxicating liquors except as hereinafter provided * * * Here, then, is, first a sweeping prohibition against, not the manufacture and sale, which consequently must include manufacture as well as sale, or e converso, sale as well as manufacture in order to incur the denunciation of the statute, but against either the sale or the manufacture. The conjunction is disjunctive. The sale is forbidden, the manufacture is forbidden; and each is forbidden independently of the other. Such being the case, on the subject of the lawfulness or unlawfulness of the manufacture (which is the point before the Court) it is useless to argue as to the conditions under which it is permissible to hold intoxicating liquors in possession or to sell them."

106 The Act of 1909 defines "Liquor Dealers" as all persons, etc., "selling" liquors. Even if it be conceded that the purchase, storing, breaking bulk, etc., be a part of the occupation

thereon taxed, we cannot see how even the Attorney General can reasonably insist that the "selling"—the only thing expressly mentioned in the Act—is not also a vital and necessary element of the privilege as set out in the Act. Giving the Act the most liberal construction that can be given it in favor of the insistence of appellants, the "selling" of liquors must be held to be one of the elements which, together with the others, is necessary to bring an occupation within the meaning of the Act. If there is no occupation of selling, there can be no liquor dealer within the meaning of this provision; and if this be true, and if appellees be engaged solely in making interstate sales, then the Act of 1909, in so far as it applies to appellees, is clearly a tax on interstate commerce, and void.

But the language of the statute in question does not warrant the liberal construction above given it. It expressly defines the privilege taxed as the occupation of selling liquors.

In *Kelly vs. State*, 123, Tenn. it is expressly held that sales of the character made by appellees are interstate commerce. A little paraphrasing of the Act may throw light on the case at bar. The only sales made by appellees are interstate commerce. As applied to Appellees, the Act would read: "Liquor dealers are defined as all persons, etc., who are engaged in the occupation of making interstate commerce sales. Yet if such were the wording of the
107 Act, how or under what theory could it be held not to impose a tax upon the occupation of making interstate commerce sales, or the business of carrying on interstate commerce?

The conclusion is inevitable.

Having discussed the rights of appellees, we now take up the question of:

Remedies.

The first question presented under this head is:

Did the Chancellor err in enjoining (a) the Assessment and (b) the collection of the State tax in the Southern Operating Company case?

Enjoining Assessment.

The bill charges that appellants had threatened to and were about to assess appellees with a void and unconstitutional State tax; and further alleges fear of irreparable injury, etc.

The jurisdiction of the Chancery Court to enjoin the assessment of a void State tax, as distinguished from the collection is too well settled in Tennessee to need the citation of authority.

Having enjoined the assessment of this tax, it was unnecessary to go further, and enjoin the collection; but as appellants question the right and jurisdiction of the Chancellor to enjoin the collection of the State Tax in this cause we shall discuss the question of
108

Enjoining Collection.

We concede we have no Tennessee authority on the right of a Chancellor to enjoin a void State tax. We concede the statutes of Tennessee provide that no injunction or similar writ shall issue against the collection of such a tax. We call the attention of the Court, however, to the special and peculiar facts set out in the Southern Operating Company bill, which makes out, as we insist, as clear a case of multiplicity of suits and irreparable injury; and practically no remedy at law; and certainly no plain, adequate and complete remedy. Appellate in the case last above mentioned is unable to comply with the statute with reference to payment under protest. Is he to be subjected to a void tax, having no application to him simply because he is physically unable to comply with the statute? There must be some remedy, and where multiplicity of suits and irreparable injury are shown, with no remedy, we submit the Chancery Court has inherent jurisdiction by its injunctive process, or otherwise, to grant relief.

The County Tax.

Both bills seek to enjoin the collection of the County tax, and whether or not the Southern Operating Company is correct in its contention that the Chancery Court has jurisdiction upon the extraordinary case presented, to enjoin the State tax, the jurisdiction of the Chancery Court to enjoin the collection of a void County tax is well settled.

City of Nashville vs. Smith, 16 Pickle, 210.

Sanders vs. Russell, 10 Lea, 300.

Arbuckle Bros. vs. McCutcheon, 3 Cates, 516.

Under the above authorities, the bill of the Southern Operating Company, in so far as it enjoins the collection of the County Tax should be sustained, even though the Court hold its contention is unsound as to the State tax.

Payment under Protest.

No question is made as to the method of procedure adopted in the Heyman case. A distress warrant was issued against him, placed in the hands of an officer, the officer came upon his premises, he paid the State tax, as required by law, and brought his suit in the Chancery Court, praying for a recovery back of the State tax, together with costs, penalties, etc., which he had been compelled to pay; and praying for injunction against the collection of the County tax. Under the authorities hereinabove cited, and especially under:

Arbuckle Bros. vs. McCutcheon, 3 Cates, 516,

this was the proper procedure.

In closing, we call the special attention of the Court again to the case of Kelly vs. State, Supra. In view of the holding in that case, we cannot see how the conclusion reached by

General Cates, and forcibly expressed by him in his own able brief filed in that case, at page 117, can be avoided:

"If the contention made on behalf of defendant be sound, the state has no sort of control over the business of defendant in selling liquor, if the sale be out of the state, even though the business be carried on on her soil and under the protection of her laws.

"If the act of selling liquor for shipment out of the State be interstate commerce the State cannot burden it even to the extent of placing a license tax upon such occupation, or to state it indefinitely, if the act of selling liquors by defendant was a part of, or materially affected, such interstate commerce, it would be beyond the power of the State to impose a tax upon the business of making such sales."

We respectfully insist that the sole business of appellees consists in the making of such sales; that that is the distinguishing feature of appellees' business. That appellees' business being the occupation of carrying on interstate commerce, they are within the protection of the interstate commerce clause of the constitution, and are not subject to the privilege tax imposed by Chapter 479 of the Acts of 1909.

Respectfully submitted,

(Signed) LITTLETON, LITTLETON & LITTLETON.
PRITCHARD, ALLISON & LYNCH.
WILLIAMS & LANCASTER.

111 Supreme Court of Tennessee, at Knoxville, September Term, 1912.

TUESDAY, November 12, 1912.

Court met pursuant to adjournment, present and presiding the Honorable Chief Justice John K. Shields and Honorable Associate Justices M. M. Neil, D. L. Lansden and Arthur S. Buchanan.

The minutes of yesterday were read and signed when the following proceedings were had, to-wit:

PAUL HEYMANN et al.

vs.

W. P. HAYS, Clerk, et al.

Reversed and Remanded.

Be it remembered that this cause came on to be heard on this the — day of November, 1912, before the Honorable the Judges of the Supreme Court of Tennessee upon the transcript of the record from the Chancery Court of Hamilton County, the assignment of errors on behalf of the appellants, W. P. Hays, Clerk, etc., et al., and the reply thereto by the appellees, Paul Heymann and Jules Heymann, and the Court being of the opinion that the case made by complainants' bill is not different in principle from that made in the case of Logan vs. Brown, Clerk, decided by this court at its September Term, 1911, the opinion being reported in 141 South Western Reporter 751, and 125 Tennessee —, and that this case is ruled

by the conclusions reached and stated by this court in said case of Logan vs. Brown, and the Court being further of the opinion that there is error in the decree of the Chancellor in not following and applying to the facts alleged in the bill the principles and holding of this Court in Logan vs. Brown, Clerk, and that the assignment of errors filed on behalf of appellants is well taken and should be sustained, and that the decree of the chancellor should be reversed, it is accordingly ordered, adjudged and decreed — And the Court being further of the opinion that the demurrer interposed by the defendants in the lower court was well founded, it is therefore ordered, adjudged and decreed that the same be and hereby is sustained, and complainants' bill is hereby dismissed, except in so far

as it may be necessary to retain the same in order to collect
112 the amounts of privilege taxes due to the County of Hamilton and State of Tennessee, from complainants, carrying on the business and occupation of a liquor dealer in Hamilton County, Tennessee, and for this purpose this cause is remanded to the Chancery Court of Hamilton County in order that there may be a reference to ascertain the amount of damages suffered under the injunction issued in this cause, and for proper proceedings against complainants, and their sureties on the injunction bond, in order to collect the amount of said privilege taxes, with interest, etc., due thereon. It is further decreed that the injunction issued in this cause be and the same is hereby in all things dissolved.

And it further appearing to the court that the complainant paid under protest to the defendant Sam A. Connor, Sheriff of Hamilton County, the amount of the privilege tax due to the State for the year 1912, together with the penalties, fees, etc., thereon, aggregating \$593.75, and that the same is in the hands of said defendant Connor, it is further ordered, adjudged and decreed that said Connor retain out of said sum his fees amounting to \$15.00, — pay the remainder into the office of the Clerk of the County Court of Hamilton County to be held and disposed of by him as directed by law.

It is further decreed that complainants and their surety, The United States Fidelity and Guaranty Company, pay all the costs of this cause for which execution may issue.

113 Filed Nov. 2, 1912. Jas. T. Joy, D. C.

Knoxville, September Term, 1912.

PAUL HEYMAN et al.

vs.

W. P. HAYS, Clerk, et al.

Opinion.

The bill in this case was filed for the purpose of collecting from the Sheriff of Hamilton County \$500.00 with penalties and costs, amounting altogether to \$593.75, paid by complainants Paul and Jules Heymann, as partners, under protest for state license taxes assessed against them as wholesale liquor dealers; also to enjoin

W. P. Hays, Clerk, and J. Parks Worley and Connor, the sheriff aforesaid, from collecting license taxes of the same amount for Hamilton County. The bill was met by a demurrer, which was overruled by the Chancellor. Thereupon the bill was taken for confessed against the defendants, and a judgment rendered in favor of the complainants against the sheriff for the amount of money collected by him as aforesaid, and an injunction awarded against him and the other defendants perpetually restraining them from attempting to collect the taxes claimed for Hamilton County. The defendants appealed to this Court, and have here assigned errors.

The substance of the bill is that the complainant is a wholesale liquor dealer in the City of Chattanooga; that he has taken out a Federal license, but that he sells only to persons living in other states, on orders received from them and filled by delivering his goods to a common carrier engaged in interstate business; that he has not sold within the State, and will not sell within the State.

114 But it appears, also, from the bill, not in express terms but by clear inference from other matters stated, that the complainant has a regularly organized business—a business house and employees, &c.—and that he is conducting the business within the State of Tennessee, although he sells all his goods beyond the State.

We are of the opinion that the case falls directly within *Logan vs. Brown*, decided by this Court last year and reported in 141 S. W., 751 and 125 Tenn., and the Federal cases therein referred to and relied on, and that there is no substantial distinction between that case and the present one.

It results that the decree of the Chancellor must be reversed and the complainant's suit dismissed with costs.

NEIL, J.

115 STATE OF TENNESSEE,

Office of Supreme Court Clerk, at Knoxville:

I, S. E. Cleage, Clerk of the Supreme Court at Knoxville, do hereby certify that the foregoing is a full, true and perfect copy of the record including the pleadings, decree of the Chancellor, assignments of error and brief of appellants, Reply brief for Appellees and the opinion and decree of the Supreme Court, as the same appears of record in my office, in the cause Paul Heymann et al. vs. W. P. Hays, Clerk et al.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office in Knoxville, Tennessee, on this 12 day of December 1912.

[Seal of the Supreme Court, Knoxville, Tenn.]

S. E. CLEAGE, *Clerk.*

116 In the Supreme Court of the State of Tennessee, at Knoxville, Tennessee.

PAUL HEYMAN and JULES HEYMAN, Partners, Doing Business under the Firm Name and Style of Paul Heyman, and United States Fidelity & Guaranty Company, a Corporation Chartered under the Laws of the State of Maryland, All Citizens of the United States of America, Plaintiffs in Error,

vs.

W. P. HAYS, Clerk of the County Court of Hamilton County, Tennessee; J. Parks Worley, Revenue Agent for the State of Tennessee, and Sam A. Connor, Sheriff of Hamilton County, Tennessee, All Citizens and Residents of the United States of America, Defendants in Error.

Petition for Writ of Error.

To the Honorable John K. Shields, Chief Justice of the Supreme Court of Tennessee:

The petition of Paul Heyman and Jules Heyman, partners, doing business under the firm name and style of Paul Heyman,
117 appellees below, and the United States Fidelity & Guaranty Company, a corporation chartered under the laws of the State of Maryland, with an office and resident agent in Tennessee, and being lawfully authorized to do a surety business in the State of Tennessee, sureties below, on the cost and injunction bonds of the aforesaid petitioners; all citizens of the United States of America, by their attorneys, Littleton, Littleton & Littleton, Pritchard, Allison & Lynch and Williams & Lancaster, respectfully show:

(1) That on or about the 12th day of June, 1912, petitioners, Paul Heyman and Jules Heyman, partners, doing business under the firm name and style of Paul Heyman, filed a bill in the Chancery Court of Hamilton County, Tennessee, being a Court having original jurisdiction of the subject matter, against defendants in error herein, in which said bill they alleged in substance: (a) That said J. Parks Worley, Revenue Agent for the State of Tennessee, and said W. P. Hays, County Court Clerk of Hamilton County, Tennessee, under color and authority of Chapter 479 of the Acts of the General Assembly of the State of Tennessee of 1909, (which said Act declares certain occupations "privileges," fixes the rate of taxation on same, and prohibits the carrying on of such businesses without first paying the tax prescribed) and laws passed pursuant thereto, had assessed said petitioners with the State privilege tax provided by said Act, in the sum of Five Hundred Dollars; and with a privilege
tax in a like sum provided for the County of Hamilton by
118 laws passed pursuant to said Act, for the year beginning January 1st, 1912, together with costs and penalties for failure to pay the same; and had issued a distress warrant in twice the sum of the taxes claimed, together with costs and penalties, and placed the same in the hands of Sam A. Connor, Sheriff of Hamilton County, Tennessee, for collection. (b) That said Connor had

come upon the premises of petitioners and threatened and was about to levy the same and distrain and seize the property of petitioners. (c) That under protest and immediate duress of property, petitioners paid the said State tax, together with costs and penalties, to said Connor; but that he, the said Connor, was about to distrain upon their property for the County tax, thereby threatening irreparable injury. (d) That petitioners were and are engaged exclusively in carrying on interstate commerce, their manner of doing business being set out in detail in the bill; and were and are within the protection of Article One, Section 8, Sub-section 3, of the Constitution of the United States. (e) That said Acts of 1909, and the laws passed pursuant thereto, had and have no application to petitioners or their business; but if said Act and said laws imposing said privilege tax be construed as applying to petitioners or their business, said Act and said laws, to the extent that they apply to petitioners or their business and persons of a like class, and the acts and threatened acts of the defendants in error, by and under color of the same, are void and contravene Article One, Section 8, Sub-section 3, of the Constitution of the United States, and the laws passed pursuant thereto, vesting in Congress the exclusive power to

119 regulate commerce between the States; and work a deprivation of petitioners' rights as guaranteed by said provision of the Constitution. And petitioners expressly pleaded and relied upon said provision of the Constitution. (f) Petitioners prayed for a judgment against said defendants for the said State tax, together with the costs and penalties paid under protest; and for a temporary and permanent injunction against the collection of said County tax. The recovery and injunction prayed for were granted; and the United States Fidelity & Guaranty Company became surety on the injunction and cost bonds for petitioners.

(2) The defendants in error filed three demurrers to the bill, the first and third of which challenged the relief sought in the bill on the ground that the privilege tax in question, as applied to petitioners and their business, was not a burden on interstate commerce, or in conflict with the Federal Constitution. The second demurrer attacked only so much of the bill as predicated relief upon the allegation that the tax in question was so large as to be confiscatory, on the ground that the amount of the tax was wholly immaterial. Amongst numerous other allegations charging threatened irreparable injury, the bill incidentally alleged that the tax in question was so large as to be confiscatory. This demurrer could have been sustained without affecting the bill or petitioners' rights to the relief therein prayed; but the draughtsman clearly filed it out of an abundance of caution, under a misconception of the theory of the bill, and it was not noticed in the assignment of errors in the appellate court, or in the argument before, or opinion of, that

120 court, and need not further be considered.

(3) The Chancellor overruled the demurrers, and the defendants in error, having in open Court refused to plead further, the bill was taken for confessed, and judgment pro confesso entered, and final decree rendered and entered in accordance with the prayer of the bill, granting the recovery prayed for as to the State tax, perpetually

enjoining the collection of the County tax, and adjudging the costs of the cause against the defendants in error.

(4) From this decree, defendants in error, in due and proper form, appealed to the Supreme Court of Tennessee, that Court being the highest Court of Law or Equity in the State of Tennessee in which a decision of this cause could be had. In said Supreme Court four errors were assigned to the action of the Chancellor, in substance, to-wit: The Chancellor erred, in holding; (First) That the Acts of 1909, Chapter 479, and the laws passed pursuant thereto, do not apply to petitioners or the occupation and business carried on by them; (second) That said Act and said laws, if construed to apply to petitioners, or their business, as described in the bill, contravene the commerce clause of the Federal Constitution and are void; and therefore erred (Third) in granting the relief prayed, and (Fourth) in not dismissing the bill.

(5) Said cause came on for final hearing on or about the 12th day of November, 1912, when the Supreme Court of Tennessee rendered final judgment against your petitioners, sustained said assignment of errors, denied the relief prayed, dissolved the injunction granted, reversed the decree of the Chancellor, dismissed petitioners' bill, rendered judgment against petitioners and their said surety, the said United States Fidelity & Guaranty Company, for the costs of the cause, and awarded an execution for the same. The Court remanded so much of the cause to the Chancery Court of Hamilton County, Tennessee, as might be necessary to enable the defendants in error to collect from the plaintiffs in error, and their surety on the injunction bond, such damages as may have been sustained by defendants in error incident to the alleged wrongful suing out of the injunction. This latter action of the Court was not prayed or asked in any of the pleadings in the cause, and was purely collateral and incidental to the execution of the final decree of the Court hereinabove set out.

(6) In said cause, both in the lower court and in the Supreme Court, petitioners expressly drew into question the validity of said Chapter 479 of the Acts of 1909, of the State of Tennessee, and laws passed pursuant thereto, as applied to petitioners and their business, and the authority exercised and attempted to be exercised under and by virtue of same by defendants in error, on the ground that said state laws and said authority exercised thereunder were repugnant to said Article One, Section 8, Sub-section 3 of the Federal Constitution; and especially set up and claimed the right and privilege under said provision of the Constitution and laws passed pursuant thereto, to carry on their said business free from the burdens and restraints imposed and attempted to be imposed by said state laws, and under authority of same. The said Supreme Court of Tennessee decided in favor of the validity of said state laws and authority of defendants in error exercised thereunder, and denied to petitioners the rights, privileges and immunities claimed under the said provision of the Federal Constitution. And in resolving the issues in said cause against petitioners it was necessary for said Court to sustain the validity of said State laws and the authority exercised thereunder, and to deny to petitioners the rights

and privileges claimed under the said provision of the Constitution.

(7) Petitioners further show the Court that, as to the County tax, the sole relief sought and prayed in their said bill was and is an injunction against the collection of the same. That unless your Honor revives said injunction pending the final decision of the Supreme Court in this cause, or issues a restraining order, or otherwise preserves matters in statu quo, said former injunction being now dissolved, said defendants in error will immediately proceed to destrain, levy and collect said County tax, and the relief sought by plaintiffs in error, as to said County tax, regardless of the decision of the Supreme Court of the United States, will be defeated, and, in addition to the many hardships alleged in the bill, petitioners will be compelled, by a multiplicity of suits, to relitigate the same matters, and suffer irreparable injury.

Wherefore, your petitioners present herewith an exemplified transcript of the record of the Supreme Court of Tennessee in said cause, together with an assignment of errors, prayer for reversal, 123 and cost and supersedeas bonds, and pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Tennessee at Knoxville, Tenn., and the Judges thereof, to the end that said record in said matter may be removed into the Supreme Court of the United States, and that the errors complained of may be examined, reviewed and corrected in the Supreme Court of the United States, and that the judgment aforesaid of said Supreme Court of the State of Tennessee, may be reversed.

And your petitioners further pray that citation be granted and signed; that the bonds herewith presented be approved; and that, upon complying with the terms of the Statute in such cases made and provided, said bond and writ of error may operate as a supersedeas; and that your Honor enter an order reviving the injunction granted by the Chancellor in this cause, or, in lieu thereof, grant a restraining order preserving matters in statu quo, pending the final decision of this cause by the Supreme Court of the United States.

PAUL HEYMAN,

JULES HEYMAN, *Petitioners,*

By C. S. LITTLETON,

Attorney at Law and in Fact for Petitioners.

UNITED STATES FIDELITY
AND GUARANTY CO.,

By C. S. LITTLETON,

Attorney at Law and in Fact for Petitioners.

LITTLETON, LITTLETON & LITTLETON,
PRITCHARD, ALLISON & LYNCH,
WILLIAMS & LANCASTER,

Attorneys for Petitioners.

124 STATE OF TENNESSEE,
County of Hamilton:

Before me, the undersigned Chas. M. Fain, a duly commissioned, qualified and acting Notary Public, in and for the State and

County aforesaid, authorized by law to take and administer oaths, personally appeared C. S. Littleton, one of the solicitors for petitioners in this cause, who makes oath that he is peculiarly cognizant of the facts stated in the foregoing petition; and that they are true to the best of his knowledge, information and belief.

C. S. LITTLETON.

Sworn to and subscribed before me this 30 day of December, 1912.

[Seal Chas. M. Fain, Notary Public, Hamilton Co., Tenn.]

CHAS. M. FAIN,

Notary Public in and for Hamilton County, Tennessee.

Fiat.

The writ of error prayed for in the foregoing petition is hereby allowed on this the 9th day of January 1913 the writ of error to operate as supersedeas, and the bond for that purpose is fixed at the sum of \$500.00 *Dollars*. The Clerk is further directed to issue injunction as prayed for in the petition upon the execution of proper additional bond in the sum of \$500.00 *Dollars*, with good and solvent sureties.

Dated this the 9 day of Jan'y A. D. 1913.

JNO. K. SHIELDS,

Chief Justice of the Supreme Court of Tennessee.

Filed in my office this the 11th day of January 1913.

S. E. CLEAGE,

Clerk of the Supreme Court of Tennessee.

125 In the Supreme Court of the State of Tennessee, at Knoxville, Tennessee.

PAUL HEYMAN and JULES HEYMAN, Partners, Doing Business under the Firm Name and Style of Paul Heyman, and United States Fidelity & Guaranty Company, Plaintiffs in Error,

VS.

W. P. HAYS, County Court Clerk, etc.; J. PARKS WORLEY, State Revenue Agent, etc., and Sam A. Connor, Sheriff, etc., Defendants in Error.

The above entitled matter coming on to be heard upon the petition of the plaintiffs in error herein, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Tennessee; and, upon examination of said petition, and the record in said matter; and, desiring to give the petitioners an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter:

It is ordered, That a writ of error be, and is hereby allowed to this Court from the Supreme Court of the United States; and upon

126 petitioners executing good and solvent bond in the penal sum of \$500 *Dollars*, conditioned as required by law, said writ of error and bond shall operate as a supersedeas.

JNO. K. SHIELDS,
*Chief Justice of the Supreme Court of the
State of Tennessee.*

127 THE UNITED STATES OF AMERICA, *vs.*:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of Tennessee, at Knoxville, Tennessee, before you, or some of you, being the highest Court of Law or Equity of the said state in which a decision can be had in the said suit between Paul Heyman and Jules Heyman, partners, doing business under the firm name and style of Paul Heyman, and The United States Fidelity & Guaranty Company, plaintiffs in error, and W. P. Hays, County Court Clerk of Hamilton County, Tennessee, J. Parks Worley, State Revenue Agent of the State of Tennessee, and Sam A. Conner, Sheriff of Hamilton County, Tennessee, defendants in error, (the defendants in error herein named being the appellants in the Supreme Court of the State of Tennessee, aforesaid, and the plaintiffs in error, Paul Heyman and Jules Heyman, herein mentioned being the appellees in said Court, and the plaintiffs in error, The United States Fidelity & Guaranty Company, herein named being a joint defendant with the said Paul Heyman and Jules Heyman in the judgment, on the cost bond in the said Supreme Court of Tennessee) wherein was drawn in question the validity of a statute of and an authority exercised under said State on the ground of their being repugnant to the Constitution and laws of the United States and the decision was in favor of their validity; and, wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege or exemption especially set up and claimed under such clause of the said Constitution; a manifest error hath happened to the great damage of the said Paul Heyman and Jules Heyman, and The United States Fidelity & Guaranty Company, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 11th day of February A. D. 1913, in the said Supreme Court, to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

128 the decision was against the title, right, privilege or exemption especially set up and claimed under such clause of the said Constitution; a manifest error hath happened to the great damage of the said Paul Heyman and Jules Heyman, and The United States Fidelity & Guaranty Company, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 11th day of February A. D. 1913, in the said Supreme Court, to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 11th day of January in the year of our Lord, One Thousand, Nine Hundred and thirteen and of the Independence of the United States the One Hundred and Thirty seventh.

[Seal District Court of the United States, Eastern District of Tennessee.]

HORACE VAN DEVENTER,
*Clerk of the District Court of the United States
for the Eastern District of Tennessee.*

Allowed by,
JNO. K. SHIELDS,
*Chief Justice of the Supreme Court
of the State of Tennessee.*

129 In the Supreme Court of the State of Tennessee, at Knoxville,
Tennessee.

PAUL HEYMAN and JULES HEYMAN, Partners, Doing Business
under the Firm Name and Style of Paul Heyman, and United
States Fidelity & Guaranty Company, Plaintiffs in Error,

vs.

W. P. HAYS, County Court Clerk, etc.; J. PARKS WORLEY, State
Revenue Agent, etc., and Sam A. Connor, Sheriff, etc., Defend-
ants in Error.

Assignment of Errors.

Now come the said plaintiffs in error and respectfully submit that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Tennessee, in the above entitled matter there is manifest error, in that, to-wit:

I.

The Court erred in holding that Chapter 479 of the Acts of the General Assembly of the State of Tennessee for 1909, and
130 the laws of Hamilton County, Tennessee, passed pursuant thereto, are, as applied to plaintiffs in error, and their business, and persons and businesses of a like class, valid, and not repugnant to, or in violation of Article One, Section 8, Sub-section 3 of the Constitution of the United States.

II.

The Court erred in holding that the authority exercised and attempted to be exercised by the defendants in error, and their acts and threatened acts in the premises, under and by virtue of said Chapter 479 of the Acts of the General Assembly of the State of Tennessee, for 1909, and the laws of Hamilton County, Tennessee, passed pursuant thereto, in assessing, levying and collecting, and attempting to assess, levy and collect from said plaintiffs in error, Paul

Heyman and Jules Heyman, as aforesaid, said State and County privilege tax, and the costs, fees, penalties, etc., thereto annexed, authorized and prescribed, were valid and not in violation of Article One, Section 8, Sub-section 3, of the Constitution of the United States.

III.

The Court erred in denying to plaintiffs in error, Heymans, the rights, privileges and immunities claimed by them under said provisions of the Federal Constitution.

IV.

The Court erred in holding that plaintiffs in error, Heymans, were not engaged exclusively in the occupation of carrying
131 on interstate commerce; and that said tax upon their said occupation did not impose a burden upon interstate commerce within the meaning of said provision of the Federal Constitution.

V.

The Court erred in not affirming the decree of the Chancellor, and in denying the relief prayed.

VI.

The Court erred in: (a) reversing the decree of the Chancellor; (b) dissolving the injunction; (c) dismissing the bill; (d) sustaining the demurrers; (e) sustaining each of the assignments of error; (f) rendering judgment against plaintiffs in error, Heymans, and their surety, United States Fidelity & Guaranty Company, for the costs of the cause and awarding execution upon the same; (g) and in remanding so much of the cause to the Chancery Court of Hamilton Count, Tennessee, as was necessary to enable the defendants in error to take such proceedings as might be proper to collect from plaintiffs in error and their surety on the injunction bond, such damages as may have been sustained by the defendants in error incident to the alleged wrongful suing out of said injunction.

LITTLETON, LITTLETON & LITTLETON,
PRITCHARD, ALLISON & LYNCH,
WILLIAMS & LANCASTER,

Attorneys for Pctitioners in Error.

132 To the Honorable the Supreme Court of the United States:

PAUL HEYMAN and JULES HEYMAN, Partners, Doing Business under the Firm Name and Style of Paul Heyman, and The United States Fidelity & Guaranty Company, Plaintiffs in Error,

versus

W. P. HAYS, County Court Clerk, etc.; J. PARKS WORLEY, State Revenue Agent, etc., and Sam A. Conner, Sheriff, etc., Defendants in Error.

Come the plaintiffs in error, Paul Heyman and Jules Heyman, partners, doing business under the name and style of Paul Heyman, and The United States Fidelity & Guaranty Company, and pray that the judgment of the Supreme Court of the State of Tennessee, rendered against them in this cause and entered on or about the 12th day of November, 1912, may be reversed for the reasons set out and alleged in the foregoing assignment of errors; and pray for such further and other relief as to the Court may seem proper that justice may be done.

LITTLETON, LITTLETON & LITTLETON,
PRITCHARD, ALLISON & LYNCH,
WILLIAMS & LANCASTER,

Attorneys for Plaintiffs in Error.

133 In the Supreme Court of the State of Tennessee, at Knoxville, Tennessee.

PAUL HEYMAN and JULES HEYMAN, Partners, Doing Business under the Firm Name and Style of Paul Heyman, and United States Fidelity & Guaranty Company, Plaintiffs in Error,

VS.

W. P. HAYS, Clerk of the County Court, etc.; J. PARKS WORLEY, State Revenue Agent, etc., and Sam A. Connor, Sheriff, etc., Defendants in Error.

Bond.

Know all men by these presents, That we, Paul Heyman, and Jules Heyman, partners, doing business under the firm name and style of Paul Heyman, as principals, and United States Fidelity & Guaranty Company, as sureties, are held and firmly bound unto W. P. Hays, County Court Clerk, J. Parks Worley, State Revenue Agent of the State of Tennessee, and Sam A. Connor, Sheriff of Hamilton County, Tennessee, in the penal sum of \$500.00 Dollars, to be paid to the obligees, their successors, representatives and assigns; to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

134 Sealed with our seals and dated this 11th day of January A. D., 1913.

Whereas the above named plaintiffs in error have prosecuted a

writ of error in the Supreme Court of the United States to reverse the judgment against them, rendered in the above entitled action by the Supreme Court of the State of Tennessee.

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages if they fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

PAUL HEYMAN,
By C. S. LITTLETON,

Attorney at Law and in Fact.

JULES HEYMAN,
By C. S. LITTLETON,

Attorney at Law and in Fact.

THE UNITED STATES FIDELITY &
GUARANTY CO., Surety,

By J. G. PHILLIPS, *Att'y in Fact.*

Attest:

[Seal The United States Fidelity & Guaranty Company,
Incorporated, 1896.]

I. E. IRELAND.

I hereby approve the foregoing bond and sureties, on this the 11th day of January A. D. 1913.

JNO. K. SHIELDS,
*Chief Justice of the Supreme Court
of the State of Tennessee.*

135 In the Supreme Court of the State of Tennessee, at Knoxville, Tennessee.

PAUL HEYMAN and JULES HEYMAN, Partners, Doing Business under the Firm Name and Style of Paul Heyman, and United States Fidelity & Guaranty Company, Plaintiffs in Error,

vs.

W. P. HAYS, Clerk of the County Court, etc.; J. Parks Worley, State Revenue Agent, etc., and Sam A. Connor, Sheriff, etc., Defendants in Error.

Bond.

Know all men by these presents, That we, The United States Fidelity & Guaranty Company, as principal, and Paul Heyman & Jules Heyman, Pritchard, Allison & Lynch, Littleton, Littleton & Littleton, as sureties, are held and firmly bound unto W. P. Hays, County Court Clerk, J. Parks Worley, State Revenue Agent of the State of Tennessee, and Sam A. Conner, Sheriff of Hamilton County, Tennessee, in the penal sum of \$500.00 Dollars, to be paid to the obligees, their successors, representatives and assigns; to the
136 payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of January, A. D. 1913.

Whereas the above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Tennessee;

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages if it fails to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

UNITED STATES FIDELITY & GUAR-
ANTY CO., *Principal,*

By C. S. LITTLETON, *Att'y at Law & in Fact.*
PAUL HEYMAN,
JULES HEYMAN,

Sureties,

By C. S. LITTLETON,
Attorney at Law and in Fact, for said Heyman.
PRITCHARD, ALLISON & LYNCH,

Sureties,

By C. S. LITTLETON, *Att'n at Law & in Fact.*
LITTLETON, LITTLETON & LITTLE-
TON, *Sureties,*

By C. S. LITTLETON.

I hereby approve the foregoing bond and sureties on this the 11th day of Jan'y, A. D. 1913.

JNO. K. SHIELDS,

*Chief Justice of the Supreme Court
of the State of Tennessee.*

137 Know all men by these presents, That we, Paul Heyman and Jules Heyman, principals, and United States Fidelity & Guaranty Company of Baltimore, as surety, are held and firmly bound unto W. P. Hays, J. Parks Worlev and Sam A. Connor, in the penal sum of Five Hundred (\$500.00) Dollars, for which payment well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of January, in the year of our Lord One Thousand Nine Hundred Thirteen.

The condition of the above obligation is such that, whereas, said principal obligors have, on the 9th day of January, 1913, prayed for and obtained from the Honorable Supreme Court of the State of Tennessee, holden at Knoxville, in the State of Tennessee, a writ of injunction returnable to said Supreme Court of Tennessee, holden at Knoxville, on the — day of —, 191—.

Now, if the said principal obligors shall prosecute the said injunction with effect, or in case they fail therein, shall well and truly pay and satisfy the said obligees, or either of them all such costs and damages as may be awarded and recovered against the said

obligors in any suit or suits which may be hereafter brought for wrongfully suing out said injunction; and shall, moreover, abide by and perform such decrees as the Court may make in this cause, and pay such costs and damages as the Court may order, then, the above obligation to be void, otherwise to remain in full force and effect.

PAUL HEYMAN,
By A. S. LITTLETON,
His Att'y at Law & in Fact,
JULES HEYMAN,
By A. S. LITTLETON,
His Att'y at Law & in Fact,
Principals.

[Seal The United States Fidelity & Guaranty Company,
Incorporated 1896.]

UNITED STATES FIDELITY & GUAR-
ANTY CO., *Surety,*

By J. G. PHILLIPS, *Attorney in Fact.*

Attest:

I. E. IRELAND.

Witness:

— — —

138 THE UNITED STATES OF AMERICA, ss:

To W. P. Hays, County Court Clerk of Hamilton County, Tennessee; J. Parks Worley, State Revenue Agent of the State of Tennessee, and Sam A. Connor, Sheriff of Hamilton County, Tennessee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Tennessee, at Knoxville, Tennessee, wherein Paul Heyman and Jules Heyman, partners, doing business under the firm name and style of Paul Heyman, and the United States Fidelity & Guaranty Company are plaintiffs in error, and you are defendants in error, to show cause if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why substantial justice should not be done to the plaintiffs in error in that behalf.

Witness, The Honorable John K. Shields, Chief Justice of the Supreme Court of the State of Tennessee, this the 11th day of January in the year of our Lord One Thousand Nine Hundred thirteen, and of the Independence of the United States, the One Hundred Thirty- —.

JNO. K. SHIELDS,
Chief Justice of the Supreme Court
of the State of Tennessee.

Copy of the above citation received this — day of —, A. D. 191—, and service of the same accepted.

_____,
*Attorney General of the State of Tennessee,
and Attorney of Record for the Defend-
ants in Error in the Supreme Court
of Tennessee.*

139

Citation.

THE UNITED STATES OF AMERICA, ss:

To W. P. Hays, County Court Clerk of Hamilton County, Tennessee; J. Parks Worley, State Revenue Agent of the State of Tennessee, and Sam A. Connor, Sheriff of Hamilton County, Tennessee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Tennessee, at Knoxville, Tennessee, wherein Paul Heyman and Jules Heyman, partners, doing business under the firm name and style of Paul Heyman, and the United States Fidelity & Guaranty Company are plaintiffs in error, and you are defendants in error, to show cause if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why substantial justice should not be done to the plaintiffs in error in that behalf.

Witness, The Honorable John K. Shields, Chief Justice of the Supreme Court of the State of Tennessee, this the 11th day of January in the year of our Lord One Thousand Nine Hundred thirteen, and of the Independence of the United States, the One Hundred Thirty-eight.

JNO. K. SHIELDS,
*Chief Justice of the Supreme Court
of the State of Tennessee.*

Copy of the above citation received this 6th day of February A. D. 1913, and service of the same accepted.

CHARLES T. CATES, JR.,
*Attorney General of the State of Tennessee,
and Attorney of Record for the Defend-
ants in Error in the Supreme Court
of Tennessee.*

Endorsed on cover: File No. 23.572. Tennessee Supreme Court. Term No. 474. Paul Heyman and Jules Heyman, partners, doing business under the firm name and style of Paul Heyman, and The United States Fidelity & Guaranty Company, plaintiffs in error, vs. W. P. Hays, County Clerk of Hamilton County, Tennessee; J. Parks Worley, State Revenue Agent of the State of Tennessee, and Sam A. Connor, Sheriff of Hamilton County, Tennessee. Filed March 3d, 1913. File No. 23,572.

16

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. ~~121~~ 122

SOUTHERN OPERATING COMPANY, PAUL HEYMAN, AND
H. W. STEINER, PLAINTIFFS IN ERROR,

vs.

W. P. HAYS, COUNTY CLERK OF HAMILTON COUNTY,
TENNESSEE, AND J. PARKS WORLEY, STATE REVENUE
AGENT OF THE STATE OF TENNESSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED MARCH 3, 1913.

(23,573)

(23,573)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 475.

SOUTHERN OPERATING COMPANY, PAUL HEYMAN, AND
H. W. STEINER, PLAINTIFFS IN ERROR,

vs.

W. P. HAYS, COUNTY CLERK OF HAMILTON COUNTY,
TENNESSEE, AND J. PARKS WORLEY, STATE REVENUE
AGENT OF THE STATE OF TENNESSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

INDEX.

	Original.	Print
Caption	1	1
Transcript from chancery court of Hamilton county.....	2	1
Caption of court.....	2	1
Style of suit.....	2	1
Prosecution bond	3	1
Injunction bond	3	1
Original bill	4	2
Injunction	10	6
Subpœna to answer.....	10	6
Order for injunction.....	11	7
Injunction bond	11	7
Injunction	12	8
Demurrer and answer of W. P. Hays, clerk, <i>et al.</i>	13	8
Order extending injunction.....	15	10
Injunction bond	15	10
Continuance	16	11
Order for leave to amend.....	16	11
Amended and supplemental bill.....	17	12

	Original.	Print
Final decree	27	19
Rule docket	29	20
Execution docket	30	21
Certificate of clerk and master.....	31	22
Brief for appellees.....	32	22
Brief for appellants	73	41
Supplemental brief for the State.....	95	53
Opinion	113	63
Decree	116	65
Clerk's certificate	118	66
Petition for writ of error.....	119	66
Allowance of writ of error.....	127	71
Assignment of errors	127 $\frac{1}{2}$	71
Prayer for reversal.....	130	73
Order allowing writ of error.....	131	73
Writ of error	132	74
Bond on writ of error.....	133	75
Bond on writ of error.....	135	76
Citation and service.....	137	77
Bond on injunction.....	138	77
Citation and service.....	139	78

1 Filed August 24, 1912. S. E. Cleage, Clerk.

2 No. 28.

Transcript.

Chancery Court of Hamilton County.

Solicitors:

Littleton, Littleton & Littleton.
Williams & Lancaster.
Pritchard, Allison & Lynch.
Sam M. Chambliss.

Parties:

Southern Operating Co. vs. W. P. Hays, Clerk.

13003.

S. M. Chambliss.

3 At a special term of the Chancery Court of Hamilton County, Tennessee, begun and held at the Court House in the City of Chattanooga, said County and State, on the 2nd Monday, it being the 8th day of August 1912, present and presiding the Hon. T. H. McConnel Chancellor in and for the Third Chancery Division of said state, the following proceedings were had, to-wit:

Style of Suit.

No. 13003.

SOUTHERN OPERATING COMPANY

vs.

W. P. HAYS, Clerk.

Prosecution Bond. Filed 15th Day of January, 1912.

We hereby acknowledge and bind ourselves for the prosecution of the above suit and payment of all such costs as may be awarded on the final hearing thereof.

PAUL HEYMANN. [SEAL.]
H. W. STEINER. [SEAL.]

Injunction Bond. Filed 15th Day of January, 1912.

Know all men by these Presents:

That we, Southern Operating Co., as principal and H. W. Steiner and Paul Heyman are held and firmly bound unto W. P. Hays,

Clerk of the County Court of Hamilton County, Tenn., in the penal sum of Five Hundred and no/100 dollars, for which payment well and truly — be made, we bind ourselves, and each of us, our and each *pf* our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 15th day of January in the year of our Lord, One thousand Nine Hundred and twelve.

The condition of the above obligation is such, That, whereas said principal obligor hath the day of the date hereof, prayed for
4 and obtained from the Court of Chancery holden at Chattanooga in the State of Tennessee, a writ of injunction, returnable to the Chancery Court holden at Chattanooga, on the fourth Saturday of January next.

Now, if the said principal obligor shall prosecute the said injunction with effect, or in case he fails therein, shall well and truly pay and satisfy the said obligee, or either of them all such costs and damages as may be awarded and recovered against the said obligors, in any suit or suits which may be hereafter brought for wrongfully suing out of said injunction and shall moreover abide by and perform such orders and decrees as the court may make in this case, and pay such costs and damages as the court may order, then the above obligation to be void; otherwise to remain in full force and effect.

SOUTHERN OPERATING CO., [SEAL.]

By LEE BLUM, *Sec'y.*

H. W. STEINER. [SEAL.]

PAUL HEYMANN. [SEAL.]

Original Bill. Filed 15th Day of January, 1912.

In the Chancery Court at Chattanooga, Tennessee.

SOUTHERN OPERATING COMPANY, a Tennessee Corporation with an Office and Situs at Chattanooga, Tennessee, in Hamilton County, Tenn., Complainant,

versus

W. P. HAYS, Clerk of the County Court of Hamilton County, Tenn., a Citizen and Resident of Hamilton County, Tennessee, and J. Parks Worley, Revenue Agent of Tenn., a Resident of Sullivan County, Defendant.

To the Honorable T. M. McConnell, Chancellor, etc., presiding at Chattanooga, Tennessee:

The complainant respectfully shows the court:

I.

That under the laws now existing and existing on the first day of Jan. 1912, it is now lawful and was then lawful in the state of

5 Tennessee, to own intoxicating liquors and to use the same, and to give them away, and to sell such intoxicating liquors within the state for all purposes, where the sale in question is made at a point more than four miles from a school house.

That it was, on the first day of Jan. 1912, and is now lawful to sell intoxicating liquors within the State of Tennessee at any point within four miles of a school house, for all purposes same and except as a beverage.

II.

That your complainant owns and has in his possession in the State of Tennessee, in Chattanooga, Hamilton County, a quantity of liquors, and his ownership and possession thereof is lawful, as hereinbefore stated. That by reason of the penal laws of Tennessee he cannot sell or profitably dispose of the same in Tennessee. That in order to save himself from loss, he is compelled to sell this liquor to residents of other states than Tennessee. That he is now engaged in interstate commerce, and is engaged exclusively in making interstate sales. That you- complainant does not sell, nor has he sold since the first day of January, 1912, any liquors for any purpose, in the State of Tennessee, and has only sold said liquors, as hereinbefore stated, in interstate commerce; nor does he intend to sell nor has he handled for sale in Tennessee any of said liquors. That is to say: He has received and does receive, orders from citizens and residents of other states than Tennessee, for shipment of said liquors and receives payment for the liquors thus ordered by post office money orders or checks.

Upon receipt of such orders your complainant has shipped and ships to the non resident parties ordering the same, the liquors thus ordered out of the state to said non resident party using for such purpose of shipment railroads engaged in interstate business, so that your complainant is engaged exclusively in the interstate sale of liquors, and in no respect is he otherwise doing business as hereinbefore described.

III.

6 Complainant further charges that under the constitution of Tennessee, it is provided that all taxation on property shall be uniform and further that the state legislature may, from time to time, prescribe privilege taxes. Under the second of these provisions of the constitution the legislature has, from time to time, provided a tax on merchants and under the first has prescribed an advalorem tax, based upon the value of the goods on hand. Your complainant has been, and is now, paying the full advalorem tax thus charged by the State of Tennessee, the county of Hamilton and the municipality of Chattanooga on the value of the liquors in his possession.

Upon the other provision of the constitution the State of Tennessee has for years past prescribed certain privilege taxes for various purposes on various occupations, and among them a tax of \$500.00 for the privilege of selling liquors, a like tax being provided in favor of the county, Under the law of Chattanooga is authorized to impose a privilege tax on the same occupation or business, not,

however, to exceed in amount that prescribed by the state for the same purpose. Under such authority the city of Chattanooga has also prescribed a privilege tax of \$500.00 per year upon those engaged in selling liquors.

The language of the statute is as follows:

"Each vacation, occupation and business hereinafter named in this section is hereby declared to be a privilege and the rate of taxation on such privilege shall be as hereinafter fixed which privilege tax shall be paid to the county court clerk as provided by law for the collection of revenue."

Next in order in the statute is enumerated the various vacations, occupations, etc., thus declared to be privileges.

Among these is that of the business of selling liquors. Under this statute the occupation declared to be a privilege and taxed as such, is denominated a "Liquor Dealer" and defined by the act it is as follows:

"Every person, company or firm selling spiritous, vinous or malt liquors, beer or ale, or intoxicating bitters, or any medicated or adulterated cider."

7 Your complainant charges that the clerk intends and purpose of this act is to tax as a privilege, the business of every person, company or firm engaged in the selling of spiritous, vinous or malt liquors within the State of Tennessee, and that in no sense is it the intent of the statute to prescribe a privilege tax for those engaged exclusively in the sale and shipment of such commodities in interstate commerce, or to non residents of Tennessee.

And your complainant further charges that if in fact he be in error as to the above and if it be true that the intent of such statute is to impose a tax upon such firm, person or corporation engaged in such exclusive interstate commerce, that the law in question is unconstitutional and void, because in conflict with that provision of the Federal constitution which gives to the Federal government the exclusive control of interstate commerce. That is to say, it is in conflict with Article 1. Section 8 sub section 3 of the constitution of the United States which provides as follows:

"Congress shall have the power to regulate commerce with foreign nations and among the several states, and among the Indian tribes".

In other words, that if it be true that the state of Tennessee, has the right to tax as a privilege the business of any one which is exclusively an interstate business, then the state of Tennessee has the right to destroy the business in question, because the power to tax is the *power to tax is the power to destroy*.

IV.

Notwithstanding the facts hereinbefore stated, your complainant charges that the defendant, W. P. Hayes, as the clerk of the county court of Hamilton County, upon the motion of defendant Worley, as Revenue Agent has, within the last few days notified your complainant of his purpose to force your complainant to pay a privilege

as to the State of Tennessee and to the County of Hamilton for the doing of the interstate commerce business hereinbefore described. This privilege tax is usually paid quarterly by those engaged in intra state business, and in accordance

with his notice it is his purpose to enforce the payment of
8 such tax for the first quarter of the year 1912, namely, the sum of \$125.00 to the State of Tennessee for the quarter beginning January 1, 1912, and a like sum to the county of Hamilton, covering the same period of time.

Your complainant has refused to pay this tax because of the facts hereinbefore set forth, and the said defendant Hayes has notified your complainant and others similarly situated that it is his purpose on Monday January 15th, and at the instance of said Worley to issue a distress warrant for the purpose of levying the said distress warrant upon the property of your complainant and collecting said privilege tax; and complainant charges that the said Hayes will proceed to do so as he has threatened unless himself and said Worley are restrained by a writ of injunction from this Court.

Your complainant further charges that the business in which he is engaged is comparatively small; that the stock of goods he has on hand is of comparatively little value; that the \$1,500.00 tax thus insisted upon for the privilege of doing an interstate business is so large in proportion to the amount of business done by him that it is in effect confiscatory and makes it utterly impossible for complainant to carry on and conduct his business.

The complainant charges, as already stated, that he has paid his ad valorem tax and that there is nothing due on that account. He further charges that if the defendant is permitted to do that which he has threatened to do, it will not only destroy the business of your complainant and make it impossible for him to exercise his right as a citizen of the Federal government, namely to engage in interstate commerce, unfettered by restraint save and except as the same may be imposed by and under the authority of Congress, but that the issuing by defendant of the distress warrant in question, will cause him irreparable injury in this, that it will close his place of business, take from his possession the property which is lawfully his own, and thus make it impossible for him to carry on and conduct the business in which he is engaged.

The complainant further charges that the threatened act of said Hayes and said Worley is without authority of law, is a
9 purely voluntary act on his part, and a misuse and abuse of the authority of his office and will constitute an unlawful trespass on the property of your complainant and upon his rights as a citizen of the United States.

Premises considered, complainant prays that defendants be made parties to this bill by proper process, and that they be required to answer the same, not under oath, the same being hereby waived.

2. That a preliminary restraining order issue, restraining the defendants from issuing the distress warrant hereinbefore described.

3. That at the hearing it be decreed that it is not the intent or purpose of the law of Tennessee to impose a tax upon the privilege of engaging in the interstate liquor business and that the complainant is engaged solely in this business and not subject to tax under

said act. But if complainant be mistaken in this, let the decree provide that the statute in question is null and void, and in conflict with the provision of the Federal constitution hereinbefore set forth.

4. Let the preliminary injunction herein prayed for be made permanent.

Complainant prays for general relief.

This is the first application for extraordinary relief in this cause.

SOUTHERN OPERATING CO.,
By LITTLETON, LITTLETON &
LITTLETON, Att'ys.

LITTLETON, LITTLETON & LITTLETON,
WILLIAMS & LANCASTER,
PRITCHARD, ALLISON & LYNCH,

Sol's for Compl.

STATE OF TENNESSEE,
County of Hamilton:

Lee Blum makes oath that he is Secretary of the Southern Operating Company, a Tennessee corporation, complainant in this cause and that he has read the above bill and knows the contents thereof, and that the same is true of his own knowledge, except as to
10 the matters therein stated to be on information and belief, and that as to these matters he believes to be true and in further verification of the bill, hereunto affixed the seal of the corporation.

LEE BLUM, *Sec'y.*

Sworn to and subscribed before me this 14th dau of January, 1912.

[SEAL.]

ELLIOTT M. BUCHANAN,
Notary Public.

To the Clerk and Master of the Chancery Court, Hamilton County, Chattanooga, Tennessee:

File this bill and issue notize to the defendant that the application for the injunction prayed for in the bill will be heard before me at Chambers in the Chancery Court Room at Chattanooga, Tennessee, Saturday, January 17, 1912, at 9:30 o'clock, A. M.

In the meantime let a temporary restraining order issue in accordance with the prayer of the bill upon the execution of bond in the sum of Five Hundred (\$500.00) Dollars, conditioned as required by law, said restraining order to remain in force until the application for injunction shall have been decided.

This January 15th, 1912 at 7:57 A. M.

T. M. McCONNELL, *Chancellor.*

Injunction. Issued 15th January, 1912.

Injunction issued to Sherriff of Hamilton County for W. P. Hays, Clerk of the County Court of Hamilton County, Tennessee and returned with the following endorsement thereon:

Came to hand this 15th day of January 1912. Executed by reading and making known the contents of the within writ to W. P. Hayes, Clerk and enjoining him as herein commanded. And I in all other respects complied with this writ.

This 16th day of January 1912.

JOHN A. MCGILL, D. S.

Subpoena to Answer. Issued 15th January, 1912.

Subpoena to answer issued to Sheriff of Hamilton County, for W. P. Hays, Clerk and returned with the following endorsement thereon:

11 Came to hand this 15th day of January 1912. Executed by reading and making known the contents of the within writ to W. P. Hays, Clerk and summoning him as herein commanded. I gave a copy of the bill to W. P. Hays, Clerk, this 16th day of January, 1912.

JOHN S. MCGILL, D. S.

Order. Enrolled 25th Day of February, 1912.

No. 13003.

SOUTHERN OPERATING CO.

vs.

W. P. HAYS, Clerk.

This cause was heard before Hon. T. M. McConnell, Chancellor. On application of complainant for injunction and after issuance of restraining order and directing the parties to appear and present the application for injunction, and after argument, the Court is of the opinion that preliminary injunction should issue, and it is therefore ordered, upon complainants giving bond in the sum of five hundred (\$500.00) dollars, with good and solvent surety, injunction will issue, enjoining defendants from taking any steps as prayed on the bill, covering the first quarter of the year 1912; that is to say from January 1st to April 1st, inclusive.

This cause was heard more than 5 days ago, and complainants were notified that bonds must be made within 5 days; and it is further ordered that this order will be entered today, and that the bonds provided for, must be executed by 5 P. M. on this day, February 26, 1912, otherwise injunction will stand dismissed.

Injunction Bond. Filed 23th Day of February, 1912.

Know all men by these Presents:

That we, Southern Operating Co., as principal and Herbert Oppenheimer and J. B. F. Lowery as sureties are held and firmly bound unto W. P. Hays, Clerk and J. Parks Worley, State Revenue Agent, in the penal sum of Five Hundred Dollars, for which pay-

ment well and truly be made, we bind ourselves, and each of us, our and each of our heirs, executors or administrators, jointly and severally, by these presents. Sealed with our seals, and dated
 12 this 26th day of Feby. in the year of our Lord, One Thousand Nine Hundred and twelve.

The condition of the above obligation is such, that, whereas said principal obligor hath the day of the date hereof prayed for and obtained from the Court of Chancery holden at Chattanooga, in the State of Tennessee, a writ of injunction, returnable to the Chancery Court holden at Chattanooga, on the first Monday in April next.

Now, if the said principal obligor shall prosecute the said Injunction with effect, or in case he fails therein, shall well and truly pay and satisfy the said obligee, or either of them, all such costs and damages we may be awarded and recovered against the said obligees, if any suit or suits which may be hereafter brought for wrongfully suing out of said Injunction, and shall moreover abide by and prefer, such orders and decrees as the Court may make in this case, and pay such costs and damages as the court may order, then the above obligation to be void, otherwise to remain in full force and effect.

SOUTHERN OPERATING CO., [SEAL.]

By LEE BLUM, Sec.

HERBERT OPPENHEIM.

[SEAL.]

J. B. F. LOWERY.

[SEAL.]

Injunction. Issued 26th Day of February, 1912.

Injunction issued to Sheriff of Hamilton County for W. P. Hays Clerk and returned with the following endorsement thereon:

Came on to be heard this 26th day of Feb'y, 1912. Executed by reading and making known the contents of the within writ to W. P. Hays, Clerk and enjoining him as herein commanded. And I in all other respects complied with this writ.

This 28th day of February, 1912.

JNO. A. MCGILL, D. S.

Injunction. Issued 26th Day of February, 1912.

Injunction issued to Sheriff of Sullivan County, and returned with the following endorsement thereon:

I hereby acknowledge service of the within injunction.

13 This 27th day February, 1912.

J. PARKS WORLEY,

State Rev. Agent,

By S. M. CHAMBLISS, Att'y.

Demurrer and Answer of W. P. Hays, Clerk, and J. Parks Worley, State Revenue Agent. Filed 22nd Day of March, 1912.

I.

Defendants demur to so much of the bill as seeks to enjoin them in the collection of revenue due the State, for the reason that they

are officers charged with the duty of the collection of revenue, and it appears from the bill that defendant Hays was in process of collection of said revenue, and no injunction will lie to restrain said collection. No injunction will lie to restrain the assessment or collection of a state tax of the kind sought to be enjoined. The remedy of the complainant is confined by statute to payment under — and suit to recover.

II.

To so much of the bill as seeks to enjoin the collection of state and county taxes upon the ground that the complainant is engaged in and intends to engage in, an interstate business, that is to say, selling only to parties outside of the State, defendants demur for the reason that the privilege tax referred to is imposed by law on the complainant under the facts stated in the bill, and its imposition is not a burden on commerce between the states, or in conflict with the Federal Constitution.

III.

To so much of the bill as seeks an injunction on the ground that the imposition of the tax referred to would destroy the business of the complainant because of the size of the tax as compared to the size of *his* business defendants demur, because this is wholly immaterial.

SIZER, CHAMBLISS & CHAMBLISS,

Att'ys for Compl's.

And now, for answer to so much of the bill as defendants are advised it is material for them to answer, defendants say:

14 That it is untrue that they are engaged in the assessment and collection of the tax sought to be restrained, voluntarily and are abusing and misusing their authority, but that on the contrary they are endeavoring to carry out their sworn duty as State and County officers, and, as such, charged with the collection of privilege taxes, and that prior to the filing of the bill in this cause and the granting of the injunction, motion was made by the Revenue Agent, J. Parks Worley, demanding that the defendant Hays issue distress warrants against the above complainant and others to enforce the collection of the privilege tax referred to, with all costs and penalties, and that the Clerk would be liable under his bond should he fail to endeavor so to do. Defendants deny that no assessment has been made but if so, this is wholly immaterial, as no assessment was necessary. A list containing the names of this complainant and other delinquents had been filed in the office of defendant Hays by defendant Worley, prior to the filing of this bill.

Further answering, the defendants deny that the complainant is engaged solely in the sale of liquor to parties outside of the state, or has been so engaged or has any intention of confining sale in the future to such parties, if he is able to continue to do business in Tennessee and defendants deny, on information and belief, that the complainant has not only made repeated sales inside of the State of liquor as a beverage, in violation of the laws of Tennessee but that

he has made sales for other purposes within the state of Tennessee, and that if he continues to do business in Tennessee as a merchant and liquor dealer, he will continue to make sales within the State and defendants are advised and charge that because of such sales, and the fact that the complainant is in a position to make such sales, and is allowed to engaged in the business of a wholesale liquor dealer in the State of Tennessee he is liable for the tax sought to be enjoined in this cause. All other allegations of the bill not demurred to or denied are denied as fully as if specifically mentioned.

And now, having fully answered, defendants pray to be hence dismissed with reasonable costs.

SIZER, CHAMBLISS & CHAMBLISS.

15

Order. Enrolled 2nd Day of April, 1912.

No. 13003.

SOUTHERN OPERATING CO.

vs.

W. P. HAYS, Clerk.

In this cause, it is ordered that upon complainants giving additional bonds conditioned as required by law, in the penal sum of \$1,500 the injunctions heretofore issued in this cause will be extended so as to apply to that portion of the tax claimed by defendant Hays, and Worley for the County of Hamilton and the State of Tennessee, through Hays and Worley defendants for the balance of the year 1912.

The same order will be made in all cases from No. 12996 to No. 13610 in this cause, it appearing that all of said cases involve the same question between the same parties as is involved in this cause.

Injunction Bond. Filed 2nd Day of April, 1912.

Know all men by these presents:

That we Southern Operating Company as principal and Sol. Moyses as surety are held and firmly bound unto W. P. Hays, Clerk County Court of Hamilton County, Tenn. and Parks Worley, State Revenue Agent in the penal sum of Fifteen Hundred Dollars for which payment well and truly be made, we bond ourselves, and each of us our and each of our heirs, executors or administrator jointly and severally, by these presents. Sealed with our seals and dated this 2nd day of April, in the year of our Lord, One Thousand, Nine Hundred and twelve.

The condition of the above obligation is such, that, whereas said principal obligor hath the day of the date hereof prayed for and obtained from the Court of Chancery holden at Chattanooga in the State of Tennessee, a writ of injunction.

Now if the said principal obligor shall prosecute the said Injunction with effect, or in case he fails therein shall well and truly pay

and satisfy the said obligee, or either of them, all such costs and damages as may be awarded and recovered against the said obligors in any suit or suits which may be hereafter brought for wrongfully suing out of said injunction and shall moreover abide by and
16 perform such orders and decrees as the court may make in this case, and pay such costs and damages as the court may order, then the above obligation to be void; otherwise to remain in full force and effect.

SOUTHERN OPERATING CO., [SEAL.]
By LEE BLUM, *Sec'y.*
SOL MOYSES. [SEAL.]

Continuance. Enrolled 16th Day of April, 1912.

No. 13003.

SOUTHERN OPERATING CO.

vs.

W. P. HAYS, Clerk.

This cause is continued until the next term of Court by consent of parties.

Order. Enrolled 22nd July, 1912.

No. 13003.

SOUTHERN OPERATING COMPANY

vs.

W. P. HAYS, Clerk.

In this cause, by consent of parties, it is ordered that an amended and supplemental bill be filed, which is accordingly done; and said amended and supplemental bill shall stand in the place and stead of said original bill, without further or other process or order, and shall be treated and considered as having been verified and filed on the date of the filing of the original bill, and all orders, pleadings and proceedings in this cause under the bill originally filed shall remain in full force and effect under the said amended and supplemental bill and the cause will proceed under said amended and supplemental bill, in all respects as though the same were the original bill.

It is further ordered by consent of parties, that the answer filed by defendants in this cause be withdrawn, and stricken from the files *having* the cause pending on the bill and demurrer.

17 *Amended & Supplemental Bill. Filed 22nd Day of July, 1912.*

SOUTHERN OPERATING COMPANY, a Corporation Chartered under the Laws of Tennessee, with an Office and Place of Business at Chattanooga, Hamilton County, Tennessee, Complainant,

vs.

W. P. HAYS, a Citizen and Resident of Hamilton County, Tenn., Clerk of the County Court, Hamilton County, and J. Parks Worley, Revenue Agent for Tennessee, a Resident of Sullivan County, Tennessee, Defendant.

To the Honorable T. M. McConnell, Chancellor, etc., presiding at Chattanooga, Hamilton County, Tennessee:

Complainant respectfully shows the Court:

I.

That on January 1, 1912, complainant was and since continuously has been and still is engaged in interstate business exclusively, as follows:

At said date it lawfully owned and had in its possession a large stock of spiritous liquors. The laws of the State of Tennessee recently enacted regulating domestic traffic in intoxicating liquors are such that complainant cannot profitably conduct that character of business. For this reason, complainant has since said first day of January, 1912, confined, and still confines its operations exclusively to the sale of said liquors to non residents of the State of Tennessee, for shipment out of and beyond the limits of the State of Tennessee, and into other States for delivery there and has not, since that date, sold or offered for sale or handled for sale, nor does it desire or intend to sell, or offer for sale any liquors for any purpose, within the state of Tennessee; it has resorted to no subterfuge or evasion of the laws of the State of Tennessee regulating or prohibiting domestic traffic in intoxicating liquors, and it has in no way engaged in such domestic traffic.

The manner in which complainant has conducted its business since Jan. 1st, 1912, and still conducts its business, is as follows: and not otherwise: Complainant's said stock of liquors is

18 kept in its warehouse at Chattanooga, Tennessee, Complainant solicits and receives orders by mail from citizens and residents of other States for shipment and delivery in such other states of said liquors and complainant neither solicits orders in Tennessee, nor solicits nor receives orders for shipments and delivery at any points in Tennessee, nor makes any such shipments or deliveries. Upon receiving orders from citizens and residents of other states for the shipment of liquors from the State of Tennessee into such other and different states and delivery there, complainant manifests its acceptance of such orders by delivery of said liquors from its said place of business at Chattanooga, Tennessee, to rail roads engaged in interstate traffic for continuous transportation and delivery only

to points beyond the State of Tennessee, and to said purchasers; which said act of delivery closes the contract of sale; and complainant collects the price of the goods sold by checks and money orders mailed to it from said foreign states, either at the time the order is received or after said liquors are received by said purchasers.

II.

Complainant has complied with all the revenue laws of the United States and of the State of Tennessee, applicable to it. It has paid the Federal Taxes assessed against it as a liquor dealer, and holds Federal license to carry on business as such. It has paid the State County and City taxes upon its property and the ad valorem tax based upon the value of its stock of goods, commonly known as "merchants' tax" and complainant is advised, believes and charges it is subject to no further assessment for taxation. And complainant has paid all privilege taxes claimed by defendants including the privilege taxes provided for in Chapter 479, Acts of 1909, up until the said first day of January 1912. No privilege tax is claimed by the *Statute* on business done by complainant prior to said date.

III.

The Act of the General Assembly of the State of Tennessee, 1909, Chapter 479, Section 4, provides among other things, as follows:

"That each vocation, occupation and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the County Court Clerk as provided by law for the taxation of revenue."

The act then lists numerous occupations, etc., and fixes the rate of taxation against them including liquor dealers in the following language:

- "Wholesale, and in addition taxed as other merchants. . . . \$500.
- "Retail, taxed as other merchants and in addition, shall pay as follows:
- "In cities, taxing districts or towns of 6000 inhabitants or over, each, per annum. . . . 500.
- "At any place, city, taxing district or town of less than 6000 inhabitants, each per annum. . . . 500.
- "Persons selling beer or any quantity of liquors on steam boats, bat boats or any other vessel or water craft or from railroad cars, shall pay a tax, each in lieu of all other taxes to be paid in any county they may elect, per annum 500.

"Persons selling liquors in quantities of one quart or more, except manufacturers selling to dealers in original packages of not less than five gallons, are wholesale dealers and persons selling smaller quantities than five gallons are retail dealers; and the tax on liquor dealers applies to all drug stores, except in uses of wine for sacramental purposes and alcohol for domestic purposes. No

producer of grape wine, where they raise and make the wine themselves shall pay any privilege tax for selling the same.

"Provided, they shall not sell in quantities of less than one and a half (1½) gallons. "Liquor dealers are defined as every person, company or firm selling spirituous, vinous or malt liquors, beer or ale or intoxicating bitters or any medicated or adulterated cider or any social club or association incorporated, or otherwise which handles such liquors for sale. The procuring of United

20 States Revenue license to wholesale or retail liquor dealers shall be taken as prima facie evidence that the parties are in the wholesale or retail liquor business and are subject to the State and County taxes, unless established by proof that they are not so engaged. Upon any Clerk's receiving knowledge of such internal revenue license he shall have a right to collect the taxes by distress warrants.

"Provided: That nothing in this Act shall authorize or legalize the sale of liquors."

Section 16 of said Act provides:

"It is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the privilege tax prescribed for the exercise of the same, and all parties so offending shall be liable to fine of not less than \$10.00 nor more than \$50.00 for each day such privilege is exercised without license; but this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce."

Under other statutory provisions of Tennessee, the County of Hamilton and city of Chattanooga are each authorized to impose privilege taxes on occupations and business taxed by the State as such to an amount not exceeding that prescribed by the State on such business, or occupation; and said County and City have, — such authority imposed privilege taxes on the business of liquor dealers to the full amount allowed by law. The County and City have no power to tax a business as a privilege not so taxed by the State.

IV.

Complainant is advised, believes and charges that the said Act of 1909, Chapter 479, relating to privilege taxes, has no application to complainant, and that complainant is not subject to its provisions; that the clear intent, meaning and purpose of said statute is to prescribe a privilege tax against persons, firms and corporations engaged in selling spirituous, vinous and malt liquors, etc., within the state of Tennessee and not against those engaged exclusively in interstate commerce and business. As an indication of this legislative

21 intent, Section 16, of said Act provides that the penalties and inhibitions therein prescribed are not applicable to persons, firms or corporations engaged in interstate commerce.

Complainant is advised, believes and charges that, if said statute is susceptible to the construction that it imposes a privilege tax upon persons, firms, and corporations engaged like complainant, in interstate commerce exclusively, the statute to that extent violates Article

One, Section VIII, sub section 3, of the Constitution of the United States as follows:

"Congress shall have the power to regulate commerce with foreign nations, among the several states and among the Indian tribes."

And complainant pleads and relies upon said provision of the Constitution.

V.

Complainant now shows the court that defendants, J. Parks Worley and W. P. Hays, have recently conceived the idea that although complainant is engaged exclusively in interstate commerce as hereinbefore shown, it may be assessed with said wholesale liquor dealers' privilege taxes for the present year and subjected to payment thereof; and that said J. Parks Worley and W. P. Hays have the power and right to assess complainant and said defendants, proceeding under color of said Act of 1909, Chapter 479, but without warrant or authority of law, and in violation of said Article One Section VIII, sub section 3 of the Constitution of the United States and the laws passed pursuant thereto, are about to and will, unless enjoined from so doing, assess complainant with the State privilege tax for the first quarter of the present year, amount to \$125.00, together with costs, penalties, etc. provided by said statute to be paid by wholesale liquor dealers engaged in domestic traffic in spiritous liquors; and are about to, and will, likewise assess complainant with the privilege tax provided for the County in a like sum, by and under color of said Act, on Wholesale Liquor Dealers engaged in domestic traffic; and will thereupon issue distress warrants

22 against complainant and place the same in the hands of the Sheriff of Hamilton County, Tennessee, for collection. Said defendants, Worley and Hays, have notified complainant of their intention to so proceed and will so proceed unless restrained. And will likewise illegally, and unlawfully and in violation of said Section of the Constitution proceed to assess and by distress warrant or otherwise, attempt to collect the remaining three quarters of said illegally claimed State and County privilege tax at the beginning of each quarter to wit: April first, July first and October first, 1912.

Complainant is advised, believes and charges that it is in no way subject to said privilege tax as hereinbefore set out; and that said threatened acts of defendants are void and illegal, without authority of law, and in violation of said Article one, Section VIII, Sub Section 3, of the Constitution of the United States, and a misuse and abuse of the officers of defendants, and will work a deprivation of complainant's rights.

VI.

Complainant further shows the Court that while the first quarterly installment of said State privilege tax, \$125.00 above to be assessed and collected at this time, is apparently a small sum; yet, before complainant can have a hearing on the merits of its cause in the Supreme Court, the remaining quarterly installments of the present year will have been reached, and unless restrained by this Honorable Court, defendants will at the first of each month attempt to assess

complainant with said quarterly tax and will attempt to enforce the collection of same by distress warrants.

Under the provisions of the Acts of 1873, in order to have a hearing on the question of the right of said defendants to collect said taxes from complainant, it would be necessary for it to pay each quarter of said State tax as it falls due, under protest, together with all penalties, costs, fees, etc., which said penalties, costs, fees, etc. bring the total sum which complainant would have to pay over to the State Collector for the year 1912, to such an amount complainant is and will be unable to comply with this provision of the laws of Tennessee.

On the other hand, if said distress warrants are issued
23 and levied, great sacrifice and loss will result therefrom, complainant's goods on such forced sale will bring nothing like their real value. Complainant has done and is doing and will continue to do (unless this Court refuses its protecting aid) a comparatively large interstate business, but said privilege *in proportion* to same is so large as to be prohibitive and confiscatory, and complainant cannot carry on its said business and pay said tax. The seizure and sale of its stock under said distress warrant, which will be in twice the sum of the taxes, costs, penalties, etc., will close its business, and while the actual value of its property about to be wrongfully seized and sold could be found and damages fixed by a jury, the injury resulting from the demoralization of its employees and business the destruction of its credit and financial standing through necessarily unfavorable reports by commercial agencies, recognized credit rating bureaus, etc., in the commercial world, and the loss of profits on sales, would not be susceptible of ascertainment by a jury; and complainant will hardly have reopened its business after said sale, under said distress warrant, for the first quarter, before a distress warrant will issue for the second quarter, and its property be seized and sold for the payment of said second quarter; and three months thereafter a distress warrant will issue for the third quarter, and three months later for the fourth quarter, and so on.

Different officers can, and in all probability will, levy the different distress warrants for each quarter, and even for those damages which could be ascertained by a jury, complainant will have to sue each different officer, thus necessitating four separate and distinct suits, all involving the same question of law and fact all of which would mean, real, prolonged, continuing serious and irreparable injury and financial loss in the sum of many hundreds of dollars.

But, should complainant comply with the provisions of the Acts of 1873, as to said illegal State Tax, it is still without full, adequate and complete relief, except in this Court; Complainant will have to wait until said distress warrants for the first quarter together with penalties, costs, fees, etc. actually issue, and wait until the

24 collecting officer, with said warrants in his hands, comes to its premises and threatens to levy the same on its goods and wares; it will then have to pay said first quarter under protest and within thirty days thereafter, sue for its recovery back. Complainant shows the court that said distress warrants will issue at once, for

the collection of said first quarter. That before its suit against the collecting officer, filed within thirty days after it has paid the said privilege tax under protest, can be finally decided, and within two months thereafter, a distress warrant will issue for the second quarter of said privilege tax, with added costs, fees, and penalties, which complainant will have to pay, under protest and sue for within thirty days; and thereafter a distress warrant will issue for the third quarter, and then the fourth quarter. These distress warrants will be issued three months apart while the Statute of Limitations provides that complainant must begin its suit thirty days after payment under protest. Under the law it cannot pay these taxes in advance, under protest, but must wait until after the distress warrant is actually issued, in the hands of the officer and the officer comes upon its premises to levy the same. It will thus be seen, and complainant charges, that in order to recover back these illegal and unlawful sums alleged to be *done* as privilege tax for the year beginning Jan'y 1, 1912, as to the State Tax, four separate and distinct suits will be necessary, all involving the same question of law and fact; and in addition to these, complainant will be compelled by certiorari and supersedeas from the Circuit Court, or by injunction in this Court, in other suits to protect himself against said illegal and unlawful County taxes.

Complainant will be put to the expense of employing counsel, making costs bonds, etc. employing stenographers to take deposition together with many other burdens and expenses and great loss of time, necessarily incident to prosecuting numerous suits through the different Courts of the State and of the United States. These matters can and properly should be litigated in one suit and in one court. Under the law, complainant cannot recover for the enormous expense and loss of time incident to the prosecution of these numerous suits and unless relief is granted in this Court, will
25 suffer irreparable injury.

As to the County Tax, complainant's only remedy at law, except by certiorari and supersedeas, would be to sue the officer levying such distress warrant, or pay under protest. Different officers will levy said distress warrants and thus four separate distinct suits will be necessary as to the County tax; or if complainant proceeds by certiorari and supersedeas from the Circuit Court, it will be necessary for it to certiorari and supersede each one of said four distress warrants, thus, four separate and distinct suits would be necessary as to the County tax, and four separate and distinct suits as to the State tax, meaning in all eight separate and distinct suits, involving a single question of law and fact.

Complainant charges that this Court has jurisdiction to enjoin the illegal assessment of void State and County privilege taxes, and the collection of void and illegal county taxes, and this Court having assumed jurisdiction of this branch of the case, that all questions as to the State and County taxes can and properly should be litigated in this suit, and in this Court and to prevent a multiplicity of suits and irreparable injury, said defendants and each of them should be enjoined from assessing and attempting to assess complainant with

said void and illegal County and State privilege taxes and said Hays should be enjoined from issuing distress warrants for the collection of the same; and said defendants enjoined from attempting to collect the same in any manner, except in this Court and cause.

VII.

Complainant further shows the Court that because of the fact hereinabove set out, it is without remedy, except in this Honorable Court and that unless the defendants are enjoined from so doing they will immediately proceed to assess complainant with said unlawful privilege tax, and immediately proceed to seize its property for the tax so wrongfully assessed.

VIII.

Premises seen, complainant prays:

1. That defendants, W. P. Hays and J. Parks Worley, be required by proper process to appear and answer this bill but not under oath, their oaths to their answers being thereby expressly waived.

26 2. That a writ of injunction issue, restraining the defendants and each of them from proceeding to assess and collect the privilege taxes hereinbefore mentioned, and upon final hearing that the injunction be made perpetual.

3. Let it be adjudged and decreed that the laws of Tennessee do not impose a tax upon the privilege of engaging in interstate business as a dealer in spiritous liquors, and that complainant is engaged exclusively in such business and not subject to such tax; and if the Court should be of opinion that the Statute hereinbefore mentioned does impose a tax upon interstate liquor business, let said Statute be to that extent declared violative of said Commerce Clause of the Federal Constitution and void.

4. Let all such further, other and general relief be granted as the nature of complainant's cause may entitle *him* to demand and receive.

5. Grant complainant general relief.

6. This is the first application for extraordinary relief in this cause.

SOUTHERN OPERATING CO.

LITTLETON, LITTLETON & LITTLETON,
WILLIAMS & LANCASTER,
PRITCHARD, ALLISON & LYNCH,

Solicitors.

STATE OF TENNESSEE,
County of Hamilton:

Lee Blum makes oath that he is Secretary and manager of the Southern Operating Co., the complainant corporation; that he is peculiarly cognizant of the facts in said bill alleged by reason of his said position; and the foregoing bill of said company is true of his own knowledge except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be

true; and he hereto affixes the seal of said corporation in further attestation of the truth of the bill.

LEE BLUM.

Sworn to and subscribed before me this the 10th day of July 1912.

[SEAL.]

CHAS. M. FAIN,
Notary Public.

27 *Final Decree. Enrolled 22nd Day of July, 1912.*

No. 13003.

SOUTHERN OPERATING COMPANY

vs.

W. P. HAYS, Clerk.

Be it remembered that this cause came on to be heard on this July 22, 1912, before the Honorable T. M. McConnell, Chancellor upon the demurrer of the defendants to the original, amended and supplemental bills, and argument of counsel having been heard, the said demurrer having been fully understood and considered by the Court, the Court is of the opinion that said demurrer is not well taken and is therefore pleased to overrule and disallow the same; to which action of the Court the defendants then and there excepted. And the defendants having heretofore, by leave of Court, withdrawn their answer to the bills in this cause and now in open court expressly declining to make further answer or defense to said bills, relying upon their said demurrer, overruled by the Court as aforesaid, it is upon motion of complainant's solicitors ordered by the court that said bills be and the same are hereby taken for confessed against the said defendants, W. P. Hays, Clerk of the County Court of Hamilton County, Tennessee, and J. Parks Worley, Revenue Agent for the State of Tennessee, and set for hearing ex parte; And thereupon this cause coming on to be finally heard and determined upon the entire record and the court being of opinion that the complainant, Southern Operating Company is entitled to the relief sought in and by said bills, it is ordered, adjudged and decreed by the Court that the injunction heretofore granted and issued in this cause restraining and inhibiting said defendants, W. P. Hays, Clerk of the County Court of Hamilton County, Tennessee and said J. Parks Worley, Revenue Agent for the State of Tennessee as aforesaid, from proceeding to enforce and collect the privilege taxes mentioned in the bill, be and the same is hereby made perpetual; and it is ordered, adjudged and decreed by the Court that the statute laws of the State of Tennessee do not impose a tax upon the privilege of engaging in interstate business as a dealer in spiritous
28 liquors, and that the complainant was at the time of the filing of this bill and is now engaged exclusively in said business and is not subject to such tax, and that if the Act of the General Assembly of the State of Tennessee in 1909 Chapter 479, were susceptible of the construction that it imposes or undertakes to impose

a privilege tax upon the business engaged — by complainant, said tax was to that extent violative of Article I, Chapter I, Section VIII, Sub section 3 of the Constitution of the United States, commonly known as the "Commerce Clause of the Federal Constitution" and therefore unconstitutional and void.

It is therefore ordered, adjudged and decreed by the Court that the defendants pay the costs of this cause, for which execution may issue.

The defendants except to the whole of the foregoing decree and pray an appeal to the next term of the Supreme Court to be held at Knoxville, Tennessee, which appeal is granted and Sam M. Chambliss appeared in open Court and acknowledged himself surety for said appeal, which surety was accepted and approved by the court.

29

Rule Docket.

No. 13003.

Solicitors:

Littleton, Littleton & Littleton.
Williams & Lancaster.
Pritchard, Allison & Linch.
Sizer, Chambliss & Chambliss.

Parties:

Southern Operating Co. vs. W. P. Hayes, Clerk County Court of Hamilton County.

1912.

- Jan. 15. Original Injunction Bill filed.
" " Prosecution bond Paul Heyman and H. W. Steiner sureties.
" " Injunction bond \$500 Heyman and H. W. Steiner sureties.
" " Injunction issued and ret'd 1/16 served by J. A. McGill, D. S.
" " Copy of bill 3000 W. & Spa. to ans. iss'd.
" " Cert. copy order Chancellor iss'd ret'd 1/16 served by J. A. McGill, D. S.
" 16. Spa. to ans. ret'd 1/16 served by J. A. McGill, D. S.
" 20. Motion of A. B. Littleton to withdraw papers filed.

1912.

- Feb'y term.
Feb. 26. Order for preliminary injunction to issue as prayed in bill on bond for \$500 allg. compl't until 5 p. m. this day to execute bond.
" " Injunction bond \$500 Robert Oppenheim and J. B. F. Lowry sureties taken and filed.
" " Injunction iss'd to sh'ff Sullivan Co. for J. Parks Worley State Rev. Ag't and ret'd 2/27 ack'd by S. M. Chambliss, att'y.

- " " Injunction iss'd to Sh'ff Hamilton Co. for W. P. Hays, Clerk and ret'd 2/28 se-ved by J. A. McGill, D. S.
- Mar. 22. Demurrer and answer of W. P. Hays, Clerk and J. Parks Worley, State Rev. Ag't.
- " 26. Filed notices (3).
- Ap'l 1. Order extending injunction addition \$500 bond being given.
- Ap'l 2. Injunction Bond \$1,500 with Sol. Moyses surety taken and filed.
- " 16. Continued by consent.
- May 20. Motion of C. S. Littleton to withdraw papers filed.
- June 18. Motion of defendant for trial. Notice.
1912. July term.
- Jul. 22. Order allowing amended and supplemental bill filed; withdrawing answer by consent. July 22 amended & S'p'l bill filed. Notice given.
- Jul. 22. Final decree sustaining bill making injunction perpetual; judg'e't vs. defendant for costs. Granting appeal. S. M. Chambliss surety of record.

30

Execution Docket.

No. 13003.

Solicitors:

Littleton, Littleton & Littleton.
 Williams & Lancaster.
 Pritchard, Allison & Lynch.
 Sam M. Chambliss.

Parties:

Southern Operating Company vs. W. P. Hays, Clerk.

State Tax.....	\$2.50
County Tax.....	2.50
Bill 25 aa 25 bond 25 reedg. 25 Inj. bond 50.....	1.50
Reedg. 25 Inj. 1.00 copy bill 3.00 cert. 25.....	4.50
Spa. 75 Cert. copy 75 motion 10 decree 50.....	2.10
Bond 50 reedg. 25 Ini. 1.00 Inj. 1.00.....	2.75
Demurrer 25 notice 25 motion 10 order 25.....	.85
Bond 50 reedg. 25 order 25 motion 10.....	1.10
Motion 25 notice 25 decree 50 amended bill 25.....	1.25
Notice 25 final decree 75 dkt. 90 bill cost 50.....	2.40
	<hr/>
	16.45
J. A. McGill D. S. 1 dft. 1.00 2 inj. 2.00 notice 50.....	3.50
	<hr/>
	24.95

July Special Term.

July 22, decree making injunction perpetual.
 Granting appeal.

Cost Incident to Appeal.

Order appeal 25 surety recdg 50.....	.75
Transcript 11,600 W. 11.60 seal 50 ex. 25.....	12.35
	<hr/> 13.10

31 *Certificate of Clerk and Master.*

STATE OF TENNESSEE,
County of Hamilton:

I, Sam Erwin, Clerk and Master of the Chancery Court of said County hereby certify that the foregoing twenty nine pages of words and figures, comprise a full, true and perfect transcript as required by the rules of the Supreme Court, of all the records, pleadings, exhibits, proof and proceeding had by said Court in the cause wherein the Southern Operating Company, is complainant and W. P. Hays, Clerk is Defendant, as the same remains of record and on file in my office.

Witness my hand and the seal of said Court at office in the city of Chattanooga, Tennessee, this the 12th day of August, 1912.

(Signed)

SAM ERWIN, *Crm.*

31½ Filed October 25, 1912. Jas. T. Joy, Deputy Clerk.

32 In the Supreme Court of Tennessee, at Knoxville, September Term, 1912.

No. 27. Hamilton County Equity.

PAUL HEYMAN et al.

vs.

W. P. HAYS et al.

No. 28. Hamilton County Equity.

SOUTHERN OPERATING Co.

vs.

W. P. HAYS, Clerk, et al.

Brief for Appellees, Paul Heyman et al. and Southern Operating Company, in Reply to Brief Filed in this Cause by Appellants. W. P. Hays et al.

May it please the court:

As the above cases present practically the same questions of law, with the single exception that in the Southern Operating Company case there is one question not raised in the Paul Heyman case, to-wit, the right to enjoin the collection of a State tax, where a multiplicity of suits and irreparable injury is shown, we shall discuss these cases together:

Statement of the Case.

The bills allege that on January first, 1912 appellees lawfully owned and had in their possession a large stock of liquors. 33 The bills further allege that since January first, 1912, appellants' sole and only business has been that of making interstate sales, which said sales were negotiated and made entirely by mail, with non-residents of Tennessee, for shipment and delivery out of Tennessee.

The bills further allege that when appellees pursuant to negotiations for solicitation by mail, received orders for these liquors, they manifested their acceptance of these orders by delivery to a common carrier engaged in interstate commerce, for continuous transportation out of the State and into other states and delivery there to non-residents.

In the Southern Operating Company case the bill further charges irreparable injury and multiplicity of suits upon which allegations the appellee, Southern Operating Company, prayed that appellants be enjoined from attempting to collect the state privilege tax, provided in Chapter 479 of the Acts of 1909, on Wholesale Liquor Dealers.

In the Heyman case, appellees paid this state tax under protest and sued back for a recovery.

In both cases appellees seek to enjoin the collection of the privilege tax for Hamilton County.

The cases are before this Court in effect upon demurrer to the bills, and, as we take it, it will be necessary for the court to read the bills, we refer to the original bills for a full statement of the facts.

Upon demurrer the Chancellor sustained both bills. In the Heyman case the Chancellor gave judgment for the state tax, 34 paid under protest, and enjoined the collection of the county tax. In the Southern Operating Company case the Chancellor enjoined the collection of both the state and the county privilege tax.

Five assignments of error are filed by the Attorney General. These assignments, however, raise three clear cut propositions of law, to-wit:

First. Can a state privilege tax be enjoined, where the same is void, and where irreparable injury and multiplicity of suits is shown?

Second. Does Chapter 479, Acts of 1909, providing for privilege taxes upon Wholesale Liquor Dealers, apply to the business of appellees?

Third. If said Act be construed to apply to the business of appellees as described in the bill, does said Act contravene the commerce clause of the Federal Constitution?

Brief and Argument.

We shall discuss these questions in the order named.

I.

We concede the force of the cases cited by the learned Attorney-General in his brief, and admit that where no irreparable injury or

multiplicity of suits is shown, an injunction will not lie against the collection of a state tax simply because it may improperly be sought to collect the same or because the same is void. In such a case the statute referred to provides a clear, complete and adequate
35 remedy, to-wit, payment under protest. We respectfully insist that the cases cited go no further. We distinguish the case at bar, however, from that line of decisions sustaining the statute in question, as follows:

In the suit at bar, the appellee, Southern Operating Company, under the allegations of the bill, is unable to pay this tax under protest. Appellee has neither the money nor the means of raising the money to pay the same. Must he submit to have his property levied upon by distress warrant and sold under a void tax simply because he cannot physically comply with the statute providing him a remedy? Being unable to pay under protest, the appellants had threatened to and were about to issue distress warrants and levy the same upon his stock of merchandise; and sell this stock for the collection of a tax for which appellee was not liable. This meant irreparable injury to appellee. Deprived of the right to carry on his business locally by the stringent penal laws of Tennessee, he was confining his sales to non-residents of the State and to residents of other states. His credit and business, already sorely crippled by having the natural field of his operations, the state of Tennessee, cut off by the Legislature, he now, under theory of appellants, is compelled to stand by, and because he cannot comply with the statute, he must see his stock of goods levied upon and sold at public sale. The bill charges that this would demoralize his employes. That this stock of goods would bring nothing like its value on a forced sale. That he could
36 not himself buy in his goods at such forced sale; and that it would close his business. Our insistence is that under this state of facts, there was no plain, full, adequate and complete remedy at law. Appellee's only hope for relief lay in the Chancery Court. True, after his goods had been levied upon and sold, after his business had been closed up, he could have sued the officer making the levy for damages, and upon showing that the statute under which levy and sale were made, had no application to appellee, he could have recovered for the value of his liquors so seized and sold. But the injury to his financial standing, the injury to his business by reason of the loss of sales, etc., would be too speculative to be susceptible of ascertainment by a jury; and as to this damage, by far the greater injury of the two, he would be remediless.

The statute provides that even where payment is made under protest, suit must be instituted therefor within thirty days after payment under protest, and as charged in the bill the appellants threatened and were about to issue distress warrants for the first quarter of the privilege tax for the year 1912. Had appellee been able to comply with the statute as to the state tax and paid the same under protest, he would have been compelled to sue back for the same within thirty days. Before his rights under that suit in the natural course of events could have been adjudicated, appellants would have issued a distress warrant for the second quarter, three months after the issuance of the distress warrant for the first quarter, and appellees, had they been able to comply with the statute would be compelled to

37 pay this tax under protest and thirty days thereafter sue back for its recovery. And so on, as to the third and fourth quarter. Under the express holdings in Tennessee, appellee could not tender in the entire tax for the year 1912 under protest. It has been expressly held that he must wait until the distress warrant actually issues, is in the hands of the officer and the officer comes upon his premises to levy the same. If appellee chose to pay under protest and then wait until distress warrants in due course had issued for each quarter making up the year 1912, he could not then bring one suit to recover the entire amount paid, because the statute expressly requires these suits to be filed within thirty days after payment under protest. It will thus be at once apparent to the Court that in order to adjudicate his right in this matter even if he complied with the statute, four separate and distinct suits would be necessary in reference to the taxes for the year 1912, all involving the same questions of law and of fact. We insist that all of these matters can and properly should be litigated in one cause and in one court. Would it not be clearly inequitable and unjust to compel appellees every three months to file a new suit, employing counsel, court reporters and go to the other necessary and incidental expense of litigation in reference to four separate and distinct suits, when all of those matters could be litigated in one court and in one suit? On this proposition we insist that having shown a multiplicity of suits, under the well recognized jurisdiction of the Chancery Court on that ground, the Chancellor properly held he had jurisdiction of 38 this case, and accordingly upon the merits issued the injunction. If on the other hand the defendant sought to adjudicate his rights by certiorari to the Circuit Court, this same condition confronts him. Every three months he would be compelled to file a petition for certiorari in the Circuit Court, and certiorari these cases to that court and supersede the distress warrant. This would mean, as to the state tax, four separate and distinct suits there, or a multiplicity of suits. Or if appellee chose to wait until the distress warrants were issued and levied upon his property and then sued the officer levying the same, he would still have four separate and distinct suits as four distress warrants were issued for privilege tax in the year 1912, and these warrants, under the allegations of the bill, can and would be levied by different officers. Thus in order that appellee might have a hearing on the right of appellants to subject him to this tax, whether he pursued the remedy granted him by statute and paid under protest, or whether he took advantage of the remedy by certiorari or whether he stood by and waited until the officer levied these distress warrants and then sued the officer—in any event four separate and distinct suits, involving the same question of law, would be necessary, and this we insist is such a multiplicity of suits as gives the Chancery Court, under the well settled principles of equity, jurisdiction of the cause and the right to enjoin. In addition to this, as we have heretofore shown, the bill makes out a clear case of irreparable injury. So that whether upon the grounds of irreparable injury or multiplicity of suits, one or both, the Chancellor clearly had jurisdiction to issue the injunction 39 in this case.

II.

No question is made by the learned Attorney-General as to the jurisdiction of the Chancellor to enjoin the county tax in either case, and we think no question could be made. Upon proper case shown, Chancery courts have long exercised the right to enjoin the collection of County taxes.

However, having outlined our position in reference to the right of the Chancellor to enjoin the collection of a state tax upon a case of irreparable injury and multiplicity of suits, we now pass to what we consider the real question in this case, which is involved in the second and third assignments of error.

III.

We concede at the outset, that the case of *Logan vs. Brown*, decided at the September 1911 term of this Court 141 Southwestern, 752, is apparently in direct conflict with our insistence. We feel, however, that this Court in that case did not have before it the later authorities on the question of the right of a state to tax interstate commerce, and before entering into a general discussion of the question involved in this suit, we desire to take up the *Logan vs. Brown* case.

Logan vs. Brown.

40 We concede that in the *Logan* case:

"The circumstances that he purchased all his stock without the state has no weight in the case."

141 Southwestern 752.

We concede further:

"The stock of goods which he has in his storehouse is certainly not exempt from state taxation even though he imports it for the express purpose of reshipping and distributing all of it to parties outside of the state, still it has come 'to rest' within the limits of the state, and is therefore subject to taxation.

Page 753.

With this we have no fault to find. The right of a state to tax property which has come to rest within the state, is well settled. We cannot see, however, just what application that principle had to the *Logan* case. We presume *Logan* did not question the right of the state to collect merchant's ad valorem tax upon his stock. In the case at bar we concede the right of the state to collect an ad valorem tax upon appellee's stock of liquors stored in his warehouse and in the face of the bill charged that we have paid that tax. That section of the Act of 1909 providing for a privilege tax upon Wholesale Liquor Dealers, does not tax goods or property which has come at rest in

41 Tennessee, but taxes an occupation, an entirely different thing. The appellees have already paid the property tax on their stock of liquors at rest within the state.

The court then takes up the question of interstate commerce:

"First, the liquor traffic is a well recognized subject of police regulation."

Certainly the liquor traffic is a well recognized subject of police regulation; but in the case of *Kelly vs. State* 123 Tenn., (15 Cates) 557, in harmony with the great weight of authority, it was expressly held that this police power of the state did not extend to the right to prohibit or regulate interstate commerce.

The court apparently attempts to distinguish between an occupation and interstate commerce. And in support of the right of a state to tax Logan, cites *Ferry Company vs. East St. Louis*, 107 U. S. 365.

Ferry Company vs. East St. Louis, 107, 365.

In this case there was no question of a privilege tax for carrying on the business of interstate commerce. But the City ordinance of East St. Louis provided a property tax of One Hundred Dollars per boat to be paid. The decision of the Court was wholly predicated upon the theory that this was a property tax.

"The levy of a tax upon vessels or other water-craft or the exaction of a license fee by the state within which the property subject to the taxation has its situs, is not a regulation of commerce within the meaning of the Constitution of the United States."

42 *Ferry Company vs. East St. Louis*, 107 U. S., 378.

In support of its insistence, the court, in the *Ferry* case, cited the passenger cases, *Southern Howard*, 283:

"The state cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property, owned by its citizens. A state may tax the stages in which the mail is transported but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce; and yet, in both instances the tax upon the property in some degree affects its use."

It will be noticed that in the above case the Court recognizes the right of the state to tax property, although such property may be an instrumentality of commerce. The matter cases have seemed to modify the doctrine above set out, even with reference to the right of state to tax property which is an instrumentality of commerce. But as to that right, it is unnecessary to make question here.

The *Ferry* case further cites *Transportation Company vs. Wheeling*, 99 U. S., 273.

"This Court sustained a taxation levied by the City of Wheeling upon steamboats used or engaged in navigating the Ohio River between the city and Parkersburg, and the intermediate places on both sides of the river in the State of West Virginia and Ohio; the company whose property the boats were having its principal office in Wheeling."

43 It will thus be seen that although in this *East St. Louis Ferry* case, the ordinance under consideration apparently imposed a privilege tax, yet it was by the Court construed to impose a property tax and upon the express theory that it was a property tax of One Hundred Dollars per boat, the Court sustained it. For the purposes of this suit, we may concede that a state may tax property which has

its situs within the state even though that property be an instrumentality of interstate commerce. But that was not the question in the Logan case, nor is it the question in this case. Our state Constitution provides for a uniform property tax, and we have paid the ad valorem property tax.

The distinction we make in this East St. Louis Ferry case was expressly recognized in Covington, etc., Bridge Company vs. Commonwealth of Kentucky, 154 U. S. 205-208:

"It was said that 'the levying of a tax upon vessels or other watercraft, or the exaction of a license fee by the state within which the property subjected to the exaction has its situs, is not a regulation of commerce within the meaning of the Constitution of the United States.' Obviously, the case does not touch the question here involved. Upon the other hand, however, it was held in *Moran vs. New Orleans*, 112 U. S. 69, that the municipal ordinance of New Orleans imposing a license tax upon persons owning and running boats to and from the Gulf of Mexico was void as a regulation of commerce."

It will thus be seen that the East St. Louis Ferry case was decided expressly upon the theory that the ordinance in question was a property tax, and that the state had a right to impose and collect a property tax upon property which had its situs in the state. But when that case was brought to the attention of the Court in *Covington vs. Kentucky* as authority for imposing a tax upon the operation of a bridge on the ground that it was not a regulation of interstate commerce, the United States Supreme Court properly held that it did not touch the questions there involved. We respectfully insist that in this case there is no question as to the right of the state to tax property, but the question in this case is the right of the state to tax an occupation when that occupation consists in carrying on interstate commerce.

True, the East St. Louis Ferry case cites *Gibbons vs. Ogden*, 9 Wheaton, 1; *Fanning vs. Gregorie*, 16 Howard, 534; *Conway vs. Taylor*, 1st Black, 403.

Conway vs. Taylor was decided upon the express theory that:

"This power to establish and regulate ferries did not belong to Congress under the power to regulate commerce, but belonged to the states and lay within the scope of that immense mass of undelimited powers reserved by the Constitution to the states."

The above case, including the case of *Fanning vs. Gregorie*, and the earlier ferry cases are based upon a misconception of the language used by Chief Justice Marshall in *Gibbons vs. Ogden*, supra. This distinction is expressly made in the late case of *Gloucester Ferry Company vs. Commonwealth of Pennsylvania*, 114 U. S. 196-218.

"In *Gibbons vs. Ogden* (9 Wheaton, 203), Chief Justice Marshall said that laws respecting ferries as well as inspection laws, quarantine laws, health laws regulating the internal commerce of the state are component parts of an immense mass of legislation, embracing everything within the limits of a state not surrendered to the general government; but in this language he plainly refers to ferries entirely

within the state and not to ferries transporting passengers and freight between the states, and a foreign country."

Conway vs. Taylor and Fanning vs. Gregorie clearly proceed upon an erroneous conception of the language of Chief Justice Marshall; and upon the erroneous idea that there was something peculiar in ferries, which took them out of the general rule and placed them in a category by themselves, amongst "that mass of undelegated powers" reserved to the states and never delegated to Congress. Insofar as these earlier ferry cases proceed upon that theory; and if the East St. Louis Ferry cases be construed to be predicated upon the theory that a state has the right to tax the occupation of carrying on an interstate ferry, these earlier cases have been by implication overruled in the late case of Gloucester Ferry Company vs. Commonwealth of Pennsylvania.

46 "It is true that from the earliest period in the history of the Government, the states have authorized and regulated ferries, not only over waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects the states can more advantageously manage such interstate ferries than the general government; and that the privilege of keeping a ferry with the right to take tolls for passengers and freight is a franchise grantable by a state to be exercised within such limits and under such regulations as may be required for the safety, comfort and convenience of the public. Still the fact remains that such a ferry is a means—and a commercial intercourse between the states bordering on their dividing waters, and it must, therefore, be conducted without imposition by the states of taxes or other burdens upon the commerce between them.

Freedom from such imposition does not of course imply exemption from reasonable charges as compensation for the carriage of persons in the way of tolls or ferr-age or from the ordinary taxation to which other property is subjected any more than like freedom of transportation on lands implies such exemption. * * * however great her power, no legislation on her part can impose a tax

47 on that portion of interstate commerce which is involved in the transportation of passengers and freight whatever be the instrumentality by which it is carried on." "It follows that upon the case stated the tax imposed upon the Ferry Company was illegal and void."

It will thus be seen that the latter case, while recognizing the right of the state to tax ferry boats or other property, which has its situs within the state, by implication expressly points out the error in the early ferry cases which were predicated upon a misconception of the language in *Gibbons vs. Ogden*. And if the East St. Louis Ferry case, by any straining of the language used by the Court in that case, be construed as having turned upon the theory that a state has the right to tax the occupation of carrying on an interstate ferry, as distinguished from the property used in that occupation, then the East St. Louis Ferry case is by implication, expressly overruled in the Gloucester case, just above cited.

In *St. Clair County vs. Interstate S. & C. Co.*, 192 U. S. 170, the Court discusses fully the ferry cases hereinbefore referred to; and

while it did not find it necessary to pass upon the question here involved, it apparently noticed the fact that these early ferry cases have been modified:

“We must not be understood as deciding that that doctrine, which undoubtedly finds support in the opinion announced in Fanning vs. Gregorie and Conway vs. Taylor, has not been modified by the rules subsequently laid down in the Gloucester Ferry and the Covington Bridge cases. As this case has not required us to enter into those considerations we have not done so.”

It will thus be seen that even if it be conceded that the ferry cases, as cited in the case of Logan vs. Brown, *supra*, are in point, the early cases of Fanning vs. Gregorie and Conway vs. Taylor, cited in the brief of the distinguished Attorney-General in this case, have been substantially modified by the Gloucester Ferry and Covington Bridge cases and the East St. Louis Ferry case has been expressly distinguished by the Supreme Court of the United States according to our insistence, to-wit: The Supreme Court in that case construed the ordinance in question as a property tax and not an occupation tax, and predicated its decision upon the right of the state to tax property. But if it be insisted that the East St. Louis case goes further, then it has been expressly modified by the Covington Bridge case and the Gloucester Ferry case, *supra*.

But even conceding that the earlier ferry cases had not been overruled, or so distinguished and modified as to be of little force, these earlier ferry cases proceeded on the theory that the right to control ferries was a peculiar right, which (differing from the right to control all other avocations and businesses) the state had never surrendered to the government. We call the attention of the Court to

the fact that even in the earlier ferry cases, the reasoning of the Court was not strong; and in view of the fact that the holding in these ferry cases, if given the construction insisted upon by the distinguished Attorney-General, is in direct conflict with all of the other adjudicated cases involving every other line of business, the application of these cases and the reasoning therein, if not expressly modified and overruled (as we insist) is not to be extended beyond actual ferry cases.

These earlier ferry cases cannot be harmonized with the later holdings involving the interstate commerce question except upon the theory that there is something peculiarly inherent in ferries which takes them out of the general rule. Or unless the definition of a ferry be given its strict, narrowest legal meaning, and that is simply the right to use a landing or wharf wholly within the state and not including the right to operate boats, etc.

In conclusion on these ferry cases, we again call the Court's attention to the distinction between the principle announced in the East St. Louis case and the theory of the case of the appellees in this cause. In the East St. Louis case the court construing the city ordinance to be a property tax of One Hundred Dollars per boat, sustained the right of the city to tax property which had its situs in East St. Louis. In the case at bar we had paid the property tax assessed against us, but we questioned the rights of the state to tax us for the privilege of making interstate sales; and on this question

or on the question of the right of the state to tax occupations or businesses, this East St. Louis case is not in point, because it was a property tax there involved and not an occupation tax. True, the wording of the ordinance in that case might possibly be taken to indicate that it was a privilege tax, but the Court held it was a property tax, and upon that theory decided the case.

50 The next case cited in Logan vs. Brown, is Kelly vs. State, 103 Tenn., 516.

This latter case is directly in point. On the extent of the right of the State in the exercise of its police power, the court say at page 566:

"It is also said, however, that when the State police power and the national commercial power come into conflict, the former must yield." And again, speaking of the Supreme Court of the United States:

"This has been frequently shown in the decisions of that court." And again,

"The United States has recognized intoxicating liquors as proper subject of commerce." And again:

"It is impossible, therefore, for the state to prevent such sales of this product as are made within the protection of the Inter-state Commerce clause of the Federal Constitution."

Numerous cases are cited in support of this decision.

Again on page 568:

"The Wilson law, however, does not touch the case presented by the special facts set forth in the indictment under consideration. That act has reference only to intoxicating liquors brought into the State. The case before us is one wherein it appears that the liquors were sent out by the state.

On page 575, of the same opinion, the court says:

51 "It is again insisted, as on the former hearing that the indictment should be sustained under the police power. This court has always upheld the police power of the State with a strong hand; but we cannot accomplish the impossible task of making that power operative in the face of the constitution and laws of the United States." And in this case, as stated in the syllabus, page 558, the court held:

"The sale of intoxicating liquor by the acceptance of a mail order from a person in another state, which acceptance is manifested by the delivery of the liquor, to a common carrier for continuous transportation to the purchaser, which act of such delivery completed or closed the contract, is not a violation of the statute prohibiting the sale of intoxicating liquor within four miles of a schoolhouse because such act places the liquor under the protection of the Inter-state commerce clause of the Federal constitution."

In no sense does this case sustain the opinion of the court in the Logan case. On the other hand, if a state by penal law cannot prohibit inter-state sales because in violation of the federal constitution, how can it, by inflicting a confiscatory privilege tax upon such sales—a tax which is penal in its nature, and in the case of Foster vs. Steed, Clerk, 120 Tennessee, 470, it was expressly held that such was the nature of this tax, and that it was passed for the express

purpose of prohibiting such sales—attain the same end which this court held it could not accomplish by penal statute. And indeed the distinguished Attorney General, in his very able brief in the Kelley case, *supra*, calls the attention of the court to the fact that, if the contention of the defendant in — Kelley case was sound, that then the state would have no power to regulate inter-state sales by tax or otherwise, in the following language:

“If the contention made on behalf of defendant be sound, the state has no sort of control over the business of defendant in selling liquor for sale out of the state, even though the business be carried on — her soil, and under the protection of her laws.

“If the act of selling for shipment out of the state be inter-state commerce, the state cannot burden it even to the extent of placing a license tax upon such occupation, or to state *a-* differently, if the act of selling liquors by defendant was a part of, or materially affected inter-state commerce, it would be beyond the power of the state to impose a tax upon the business of making such sales.”

Brief of Gen. Cates, Kelley vs. State, p. 117.

In the Kelley case the court expressly held that the contention of the defendant was sound; that the act of selling for shipment out of the state was inter-state commerce and that the state could not burden such inter-state commerce by penalizing for such an act. If it could not punish for a single act, is not General Cates' conclusion inevitable; that it cannot burden for a continued assiduity of such acts?

We are not overlooking the fact that the court distinguishes the occupation of defendant from the sales made by him; but for the present we are confining ourselves to a discussion of the cases cited in support of the court's opinion.

The next case cited in Logan vs. Brown is Ficklen vs. Taxing District, 145 U. S. 1. In this case certain brokers in Memphis who contemplated doing a business for local as well as foreign principals, took out a license in Memphis, paying a certain sum on cash and by bond obligating themselves to pay certain other sums. The court in that case did not hold that the business done under the facts in that case for non-resident principals, was not inter-state commerce, but held that inasmuch as these parties, for a valuable consideration, to-wit: the privilege of doing business, which was granted them had obligated themselves to pay certain sums by bonds, they would not be permitted to breach their contracts simply because they had not availed themselves of the privilege granted them.

That this was the theory upon which the Ficklen case turned, is expressly recognized in Stockard vs. Morgan, 185 U. S. 35, in which latter case the court calls particular attention to the following paragraph in the Ficklen case:

“We agree with the supreme court of the state that the complainants, having taken out license under the law in question to do a general commission business and having given bond to report their commissions during the year and to pay the required percentage

thereon, could not, when they applied for similar licenses for the ensuing year, resort to the courts because the municipal authorities refused to issue such licenses without the payment of the stipulated tax. What position they would have occupied if they had no undertaken to do a general commission business, and had taken out no license therefor, but had simply transacted business for

54 non-resident principals, is an entirely different question which does not arise upon this record."

It will be noticed in the above paragraph, that the words "general commission business" as used therein, is simply to distinguish the business from strictly inter-state business. The court, in using the term "general," clearly meant business both inter-state and local, as distinguished from strictly inter-state business.

The Stockard case, *supra*, pages 36 and 37 in discussing this case, expressly and clearly defines the theory on which the decision in the Ficklen case was predicated.

"In *Brennan vs. Titusville*, 153 U. S. 289 * * * in speaking of the distinguishing features of the Ficklen case, Mr. Justice Brewer in delivering the opinion of the court in *Brennan vs. Titusville* case said at page 307 * * * : 'In other words, the tax imposed was for the privilege of doing a general commission business within the state, and whatever were the results pecuniary to the licensees or the manner in which they carried on their business, the fact remained unchanged that the state had, for a stipulated price, granted them this privilege. It was thought by a majority of the court that to release them from the obligation of their bonds on

55 account of the accidental results of the year's business, was refining too much; and that the plaintiffs who had sought the privilege of engaging in the general business, should be bound by the contracts which they had made with the state therefor.'

Mr. Justice Brewer, in our opinion, hits the key-note of the ground upon which the decision in the Ficklen case was sustained. In that case the parties had in advance, made a part payment to the state of a stipulated sum of money for the privilege of carrying on a business; and as a further consideration had, by bond, agreed to pay the state a certain sum of money on all business done by them. The question was not, whether in the first instance, the state could have compelled them to take out a license, but whether, having taken out a license, and by contract, bound themselves to pay for the same, they could later, because they failed to take advantage of the privilege granted them, defeat the obligation of their contract. We respectfully insist that the Ficklen case goes no further. The state, for a stipulated price granted the parties in that case a privilege. In consideration of the grant of that privilege they agreed to pay to the state a certain sum in cash and a certain sum upon the gross business done by them. The court properly held that the state, having fully complied with her contract, the licensees were compelled to comply with their contract, and pay what they had agreed to pay. The *The* case is somewhat analogous to that of a retail liquor dealer, who conceiving the idea that he desires to

enter the retail liquor business takes out a license and pays the state therefor, and after taking out the license and paying the state therefor, changes his mind and decides not to enter the retail

56 liquor business. Could it be supposed that he could sue back and recover the money he paid? In the latter case he contracted for a privilege. He got what he contracted for and of course, he could not rescind the contract, but to make it more nearly similar to the Ficklen case, supposing that he took out the license, paid a part in cash and gave bond to pay the remainder or executed his note for the same. Having entered into a valid contract with the state, having received exactly what he contracted for, to-wit: the privilege, can anyone suppose that because he chooses not to exercise that privilege, he could defeat the suit of the state upon that bond, or upon that note. That is the exact status in the Ficklen case. But supposing he contemplated entering the retail liquor business, but before he had actually entered into the business, he decided not to enter into the business, and did not, in fact, do a retail liquor business. Could the state compel him to take out a license for a privilege he had never exercised? The statement is absurd on its face. This was the exact distinction which the supreme court in the Stockard case recognized as having been made in the Ficklen case. Had the licensees in the Ficklen case, as stated in that case, never taken out a license, and never obligated themselves to pay for a license, and then confined their business strictly to making sales for non-resident principals—strictly to an inter-state commerce business—can any one suppose that the state could have compelled them to take out a license or impose upon their inter-state commerce business a privilege tax and that the court would not have held such action on the part of the

57 state void? If by any chance such a construction could be given the Ficklen case, then that case is expressly over-ruled in the case of Stockard vs. Morgan.

In the latter case, Stockard and others were residents of Hamilton County, Tennessee, and had been carrying on business at Chattanooga, in Hamilton County from 1897 to 1900. These parties as the representatives of non-resident parties firm and corporations, solicited orders for goods from jobbers or wholesale dealers in Chattanooga, and when such orders were obtained, sent them to non-resident principals. If the order was accepted, the goods were shipped by the non-resident principals to the local jobber or wholesale dealer. It will be seen that the facts in the Stockard case are exactly similar to the facts in the Ficklin case, with the single exception that in the Stockard case, Stockard and others had not taken out a license, and had not contracted in consideration of the granting of a privilege to pay any money. In the Stockard case, the court held that Stockard et al. were engaged in the occupation of carrying on inter-state commerce, and that the state could not tax that occupation.

We therefore respectfully insist in reference to the Ficklen case:

First. That the court predicates its decision upon the fact that the parties had, by bond, contracted to pay certain sums of money,

the amount of which was fixed in proportion to the business done:

58 Second. If any other construction is placed upon the Ficklin decision, and especially the one insisted upon by the learned Attorney General in his brief, and apparently the construction placed upon it by the supreme court in its opinion in the Logan case, then the Ficklen case has been by implication over-ruled by the Brennan case, *supra*, and by the Stockard case, *supra*.

In either event the Ficklen case is not authority in the Logan case, or in the case at bar.

The next authority cited in the Logan case, is Woodruff vs. Parham, 8 Wallace 123, decided in 1868. The sole question in that case, as stated by the court at page 147, was:

"Whether the merchandise brought from other states and sold under the circumstances stated, comes within the prohibition of the Federal constitution that no state shall, without the consent of Congress levy any impost duties on imports or exports,"

No question was made in this case as to interstate commerce. It was not insisted in this case, that the tax attempted to be collected was a burden upon inter-state commerce. The inter-state commerce clause of the Federal constitution, was not under consideration. The decision of the court turned upon the question as to whether or not goods so brought into the state 'were imports' within the meaning of the constitution. The case holds that such goods were not 'imports' within the meaning of that clause of the Federal constitution.

59 In Brown vs. Houston, 114 U. S. 622, 635, the distinction we are making is expressly recognized. *It was:*

"It was decided by this court in the case of Woodruff vs. Parham, *supra*, that the term 'imports' as used in that clause of the constitution which declares that 'no state shall, without the consent of congress, lay any impost or duties upon imports or exports does not refer to articles carried from one state into another, but only to articles imported from foreign countries.'"

In Brown vs. Houston *supra*, the court continues:

"It is necessary therefore, to consider further the question raised by the plaintiffs in error under their third assignment of errors so forth as it is based on the assumption that the tax complained of, was an import or duty on imports."

And again:

"But in holding with the decision in Woodruff vs. Parham, *supra*, that goods carried from one state to another are not imports or exports within the meaning of the clause which prohibits a state from laying any impost or duty on imports or exports, we do not mean to be understood as holding that a state may levy import or export duties on goods imported from, or exported to another state. We only mean to say that the clause in question does not prohibit it. Whether the laying of such duties by the state would

60 not violate some other provision of the constitution, that, for example, which gives to Congress the power to regulate commerce with foreign nations among the several states and with the Indian tribes, is a different question."

It will thus be seen that the Supreme Court of the United States has expressly recognized the fact that the *Woodruff vs. Parham* case cited in support of *Logan vs. Brown*, did not turn upon the question of inter-state commerce but was limited to the single questions to whether or not goods so brought into the state were 'imports' within the meaning of the import and export clause of the Federal constitution,

The case of *Brown vs. Houston*, *supra*, it might be incidentally remarked, expressly draws the distinction between bridges, ferries, etc., which may be only incidental to inter-state commerce, and inter-state commerce itself.

Except in so far as it serves to distinguish the *Woodruff vs. Parham* case, and in so far as it is in harmony with the great line of cases holding that a state cannot tax inter-state commerce, it is not in point herein. Certain coal was sent by owners in Pennsylvania to their agents in New Orleans to be there sold for their account. This coal came at rest in New Orleans. It became a part of the general property of the state, and was of course, subject to the property tax of the state. We concede that, after property has come at rest" in a state, it is subject to property tax in that state.

But in the case at bar, and in the *Logan* case, no property tax was involved. In the case at bar appellees had paid the
61 advalorem tax upon their stock of goods, as also, we presume had *Logan*. The *Houston* case, *supra*, simply holds that when property has come at rest in a state, it ceases to be inter-state commerce, becomes a part of the general property in the state and as such may be subjected to the state property tax. In the case at bar, there is no question of property coming at rest in the state. On such property as has come at rest in the state, appellees have paid the full advalorem tax. The question is not one as to property tax, but as to occupation tax, and we submit the *Houston* case has no bearing on this question.

The *American Steel and Wire Company vs. Speed*, 192 U. S. 500, and *General Oil Company vs. Crain* 209 U. S. 211, simply held that a state may tax property which has come at rest within the state.

Cargill vs. Minn., 180 U. S., 452:

The court in the *Logan* case quoted this case as determinative of the question involved. We think, however, a careful investigation of that case, and comparison with the case at bar, will show that no question of inter-state commerce was involved in that case. We concede for the purposes of this cause at the outset, that a state may tax the instrumentalities of commerce. In the *Cargill* case, the wording of the act providing for the license, was as follows:

"SECTION 1. All elevators and warehouses in which grain is received, stored, shipped or handled, and which are situated on the right-of-way of any railroad * * * are hereby declared to be public elevators, and shall be under the supervision and subject to

62 the inspection of the Railroad and Warehouse Commission of the State of Minnesota, and shall, for the purpose of this act be known and designated as Public Country elevators or Country Warehouses." * * *

Such warehouses were required to take out a license. A careful reading of the statute will show that the thing taxed—the warehouse taxed—is defined to be any elevator or warehouse in which grain is received, stored, shipped or handled, the words "received, stored, shipped or handled," being used in the disjunctive. In short, any warehouse under that statute which received grain, or stored grain, situated as that warehouse was situated, was clearly liable for the tax. In that case, the owner of the warehouse purchased grain from residents of Minnesota. He received this grain at his warehouse and stored it there. Nothing further was necessary to bring him within the terms of the statute. True, he also sold it to non-residents of Minnesota, but the statute did not tax the business of a grain merchant or the business of selling grain. It was a warehouse tax, pure and simple upon all persons who, in a particular kind of warehouse received or stored grain. We concede that so far as the inter-state commerce clause of the Federal constitution is concerned, if Tennessee had provided by an act of her legislature that all persons who received and stored liquor in a warehouse should first take out a license therefor, that the question of inter-state commerce would not be involved. In the Cargill case:

63 "It was conceded on the argument, and is fairly to be inferred from the findings and stipulations of facts that the grain is purchased, weighed and graded and delivered at the warehouse, and that defendant with its own scales and appliances weighs and grades the grain. Under these circumstances, the warehouse is a sort of public market-place where farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest acts as market-master, weighmaster, inspector and grader of grain. Surely such a business is the public interest and is sufficiently affected with the public interest to warrant a very considerable amount of regulation of it by the State."

The statute in that case was simply a privilege tax placed upon warehouses operating in the state of Minnesota. The statute involved in this case, is not a tax upon a warehouse, but upon the business of selling liquors.

The Cargill case expressly turns upon the point that the business operated was not an inter-state business, because under the statute it consisted solely in receiving and storing grain in a warehouse within the state.

"The statute puts no obstacle in the way of purchase by defendant company of grain in the state, or the shipment out of the state of such grain as it purchased. The license has reference only to the business of the defendant, and its elevator or warehouse. The statute only requires the license in respect of business conducted at an established warehouse, in the state between the defendant and the sellers of the grain."

64 The sellers of the grain were situated in the state of Minnesota. The grain was received and stored there. It was this under the express wording of the statute, that was taxed. Had the statute gone further and laid a tax upon the storing and sale or selling and had defendant in the Cargill case been engaged in interstate commerce, we submit then he would have come within the protecting clause of the Federal constitution.

In *Kidd vs. Pearson* 128 U. S. 1, the exact distinction we seek here to make, was made. Our proposition is that in the Cargill case, only the receiving and storing of the grain, and the operation of a warehouse was taxed. The words receiving, storing, etc. handling or shipping were disjunctive, and did not necessarily include the interstate sales, which were made from the warehouse. In *Kidd vs. Pearson*, supra, it was said:

"Here, then, is, first, a sweeping prohibition against, not the manufacture and sale; not a dealing, which is composed of both steps, and consequently must include manufacture as well as sale, or a converse sale as well as manufacture in order to incur the denunciation of the statute, but against either the sale or the manufacture. The conjunction is disjunctive."

"Manufacture is transformation—the fashioning of raw material into a changed form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce."

65 Had the statute acted upon the manufacture and sale and exportation, the court clearly indicates that the statute would have been violative of the constitution.

The Tennessee statute expressly defines liquor dealers as all persons engaged in selling liquors. No tax is placed upon the receiving of liquors, or the storing of liquors, or even the operation of a liquor warehouse. The tax is placed upon the selling or upon the occupation of a wholesale liquor dealer, and we respectfully insist that the Cargill case, in which case the tax was limited to a warehouse operating solely within the state, does not apply. True the warehouse may have incidentally been an instrumentality of commerce; that is, goods stored there may have eventually been shipped, but it was the storage of the goods and not the sales that was taxed.

We have now discussed at some length every case cited in support of the opinion of the court in *Logan vs. Brown*. We respectfully submit that not a single case therein cited, sustains the opinion of the court. And now, having discussed those cases, we take up the argument of the case upon its merits:

In his Brief the learned Attorney General, cites a case from the Texas Court of Appeals, in which the occupation taxed is defined. This case can have no bearing upon the question before the court. Chapter 479 of the acts of 1909 expressly defines the privilege tax in the following words:

"Liquor dealers are defined as every person, company or firm selling spiritous liquors, etc."

66 It will be seen that the Legislature defines, in the face of the act, what a liquor dealer is. It states exactly the thing which it declares a privilege. It does not declare the purchase of liquor a privilege, it does not declare the receiving of liquor a purchase, it

does not declare the storing of liquor a privilege, but it expressly defines a liquor dealer as a person who is engaged in the business of selling liquor.

Supposing, to put the question clearly, we say the statute were to read as follows:

Liquor dealers are defined as every person, company or firm engaged in making inter-state commerce sales of spiritous liquors, etc.

Could any court hold that such a statute was constitutional and not in violation of the inter-state commerce clause of the Federal constitution, and yet that is precisely the interpretation that the court must place upon the act if it taxes the occupation of a person engaged solely in interstate commerce.

It is true in *Logan vs. Brown* the court seems to indicate that what it taxes is not the occupation of making inter-state sales, but the occupation of purchasing, receiving and storing liquors. This construction is not warranted by the statute. A person who sells liquors may incidentally receive and store the same, but it is not that receiving and that storing which is taxed.

Again, the court seems to distinguish between an occupation and a single act. It holds that it is the business or the occupation which is taxed, and not the acts done in that occupation.

In *Stockard vs. Morgan*, page 36, quoting from Mr. Justice Bradley in the *Robbins* case, 120 U. S. 489, the court say:

"The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on inter-state commerce."

And again:

"Although it is said in the opinion of the state court herein, that the thing taxed is the occupation or merchandise brokerage, and not the business of those employing the brokers, yet we have seen from the cases already cited that when the tax is applied to an individual within the state selling the goods of his principal, he is a non-resident of the state, it is in effect a tax upon interstate commerce, and that fact is not in any wise altered by calling the tax one upon the occupation of the individual residing within the state while acting as the agent of a non-resident principal."

We call the especial attention of the court to the case of *Stockard vs. Morgan* in which case the authorities are reviewed at some length.

In the case of *Kelley vs. State* decided by this court it was expressly held that negotiations for sale, the sale and shipment of liquors, etc. was inter-state commerce.

In *Crutcher vs. Commonwealth of Kentucky*, 141 U. S. it was said: "We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on inter-state commerce, no matter how specious the pretext may be for imposing it. *Pickard vs. Pullman Southern Car Company*, 117 U. S. 1; *Robbins vs. Shelby County Taxing District* 120 U. S. 489; *Leloup vs. Port of Mobile*, 127 U. S. 640; *Asker vs. Texas*, 128 U. S.

129; Stoutenberg vs. Hennick, 129 U. S. 141; McCall vs. California 136 U. S. 104. * * *

As a summation of the whole matter, it was aptly said by the present Chief Justice in Lyon vs. Michigan, 135 U. S. 161, 163:

We have repeatedly held that no state has a right to lay a tax on inter-state commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on", for the reason that taxation is a burden on that commerce and amounts to a regulation of it which belongs solely to Congress."

The Act of 1909 defines the privilege taxed. The business of appellees is solely that of making inter-state sales. This court
69 has held in the Kelley case, after a thorough review of all the authorities, that such sales were inter-state commerce. As a necessary incident to that inter-state commerce, the appellees stored their goods at Chattanooga, and had employes who assisted them in negotiating sales and making shipments. The State cannot lay an additional tax upon the stock of goods owned by appellees. They have paid the advalorem tax, and the constitution of this state provides that all property shall be taxed alike. The legislature has provided no tax upon the storing of these liquors as stored by appellees. Indeed, it is doubtful whether the legislature could declare the storing of appellee's own liquors in *his* own warehouse a privilege, but that is immaterial here. The bill does not allege that appellees purchased their stock of liquor. For all that the bill shows, they may have manufactured it, and may have paid the tax for manufacturing same. However, conceding that they did purchase it the Act of 1909 provides no tax upon persons engaged in purchasing liquors. The privileges taxed is defined *in* the face of the act in plain and unmistakable language. True appellees are engaged in the business defined in the act according to the strict letter of the act, but we respectfully insist that as held in the Stockard case, the fact that the Legislature of Tennessee declares an occupation of carrying on inter-state commerce a privilege, does not render such privilege subject to a state law.

In conclusion, we desire to call the attention of the court to the fact that this brief is dictated hurriedly on the night preceding the day on which the case is called; that we received a copy of the
70 Attorney General's Brief and assignments of error in due time, but although we have made a thorough investigation of the authorities, because of the fact that every court in Hamilton County was in session, as well as the Supreme court in which we had other cases pending, we have been unable to brief this question as it should be briefed. We supposed as a matter of usual professional courtesy, especially in a case involving the intricate questions of law, which this one does, we would be allowed additional time in which to file a proper brief. This time has not been granted us; and away from our own library, and without the notes, etc., which we made at the time we filed the original bills in these causes, we have prepared this memorandum brief, largely confining ourselves to a discussion of the cases cited by the court and the Attorney General, without

going further and citing those authorities upon which we rely to support our case.

We shall at an early date, submit a supplemental brief, fully covering the entire question, which we hope the court will find the time to consider. In the meantime, we respectfully insist that the action of the Chancellor was correct; that Chapter 479 of the Acts of 1909 has no application to appellees; but if it be construed to apply to business engaged in by appellees, then to that extent it contravenes the interstate commerce clause of the Federal constitution, and is void.

We call the special attention of the court to the case of Crutcher vs. Kennedy, supra, Stockard vs. Morgan, supra, and Kelley vs. State, supra; and respectfully insist that the conclusion reached by the distinguished Attorney General in the excerpt from his brief hereinabove quoted in the case of Kelly vs. State, in view of the decision of the court in that case, is inevitable; that if the State has no right to penalize a single sale under the penal statutes of Tennessee, it cannot penalize a continued assiduity of such sales, or the business or occupation of making such sales, or in the words of the statutes, the occupation of selling (in inter-state commerce), by a privilege tax imposed upon such occupation.

Respectfully submitted,

WILLIAMS & LANCASTER.

PRITCHARD, ALLISON & LYNCH.

LITTLETON, LITTLETON & LITTLETON.

72 Filed October 14, 1912. S. E. Cleage, Clerk, by Jas. T. Joy, D. C.

73 In the Supreme Court, at Knoxville, September Term, 1912.

No. 28. Hamilton Equity.

SOUTHERN OPERATING COMPANY

vs.

W. P. HAYS, Clerk, et al.

Assignment of Errors and Brief on Behalf of Appellants, W. P. Hays, Clerk of the County Court of Hamilton County, and Others.

Statement of the Case.

This suit was instituted in the Chancery Court of Hamilton County by complainant, a Tennessee corporation, claiming to be an "Inter-state liquor dealer", for the manifest purpose of having reviewed and overruled, or in an attempt to escape the force of, the decision of this court in the case of Logan vs. Brown, Clerk, decided at the September Term, 1911 (141 S. W. p. 751), holding Logan liable for the privilege tax imposed upon liquor dealers in this state, though he only sold liquor to persons living in other states upon orders received by mail from such persons—the liquor being delivered by Logan to an inter-state carrier in this state for shipment

to the purchaser and also for the purpose of enjoining the county court clerk from issuing a distress warrant for not only the state privilege tax but also for county privilege tax sought to be imposed upon complainant as a liquor dealer.

74

Pleadings.

The Bills.

This case is somewhat singular, in that, after the original injunction bill was filed on January 15, 1912 (Rec. pp. 27) and there had been a demurrer and answer thereto (Rec. pp. 11-12), the complainant was, by order of the court below showing consent of the defendants, allowed to substitute an amended or supplemental bill to stand in the room and stead of the original bill as from the day of the filing of the original bill, and by said order it was also provided that the answer which had been filed by the defendants, denying all the material averments of the original bill, be withdrawn and stricken from the files, leaving the case pending upon the amended and supplemental bill and the demurrer, which had already been filed to the original bill (Rec. p. 14).

The Amended and Supplemental Bill.

Notwithstanding the complainant in its original bill (p. 6) had solemnly averred that its stock of goods on hand was of comparatively little value, nevertheless, when it came to file its amended bill it avers in substance that on January 1, 1912 it was the owner and had in its possession "a large stock" of spiritous liquors" and that "since the first day of Jan. 1912", it had confined its operations exclusively to the sale of said liquors to non-residents of the state for shipment out of and beyond the limits of the State, and that it had not, "since said date", sold or offered for sale or handled liquors for sale within the State of Tennessee—nor is it its desire or intention to sell or offer for sale liquors within the State of Tennessee.

75 The manner in which complainant averred that it did its business was that, it kept its liquors in its warehouse in Chattanooga, Tennessee, where it received orders by mail from citizens of other states, and that it manifests its acceptance of such orders by delivery of the liquors purchased from its said place of business in Chattanooga to railroads engaged in inter-state traffic for continuous transportation and delivery to the purchaser in another state, and that it received the price of goods by money orders or checks mailed to it "either at the time the order is received", or after said liquors are received by said purchaser (Rec. pp. 15-16).

Further, it is averred that complainant had complied with the revenue laws of the United States, and holds federal licenses as a liquor dealer to carry on its business as such, and that it had paid the merchant's tax upon the value of its goods, and all ad valorem

tax to the State, County and Municipality, and that it had paid all of the privilege taxes of January, 1912, by which we assume it is meant to aver that the complainant had paid the privilege tax imposed by the State upon liquor dealers by said Act.

Further, after setting out the provisions of the Act of 1909, Chapter 479, with relation to the privilege tax imposed upon liquor dealers, it is insisted that said act does not apply to the business carried on by complainant, because of certain provisions contained in Section 16 of the Act, declaring it to be a misdemeanor to exercise any of the privileges named in said act, and that any person so offending shall be liable to a fine of not less than ten nor more than fifty dollars for each day such privilege is exercised, without license, and providing, "that this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce."

And it is insisted that if the Act is construed to apply to the business of complainant that it's void because in contravention of
76 the commerce clause of the Federal Constitution (Rec. pp. 17-19).

Further, it is charged that the defendant Hays, as Clerk of the County Court of Hamilton County, and the defendant J. Parks Worley, State Revenue Agent for East Tennessee, claim the right to issue a distress warrant against complainant upon the ground that it is liable for the privilege tax imposed upon liquor dealers by the Act of 1909, and they are about to issue a distress warrant for one-fourth of the annual tax, to-wit, the sum of \$125.00 and that if the Clerk is allowed to issue this distress warrant that before the question raised thereby can be determined he will issue in the course of the year three other distress warrants for the remaining amounts due on the other three-quarters of the year, and that if this is permitted to be done the place of business of complainant will be closed and the result will be the "demoralization of its employees and business and the destruction of its credit and financial standing," etc. which will cause complainant irreparable injury, and therefore, on this account, and the alleged multiplicity of suits which will be required to enjoin distress warrants in the future, entitles complainant to come into a court of equity and have the whole question settled (Rec. pp. 19-23).

The bill prays that the defendant Hays, as Clerk be enjoined from issuing the distress warrant, and that it be decreed that it is not subject to a privilege tax on account of the character of the business carried on by it as set out in the bill (Rec. pp. 23-24).

The Demurrer.

It seems that the demurrer filed to the original bill was treated as demurrer to the amended bill, and the grounds thereof are in substance as follows:

77 (1). That as to the State tax the remedy by injunction does not lie, but that the only remedy is payment of the tax under protest and suit to recover the same (p. 11).

(2). That upon the facts stated in the bill the complainant is

liable both to the State of Tennessee and County of Hamilton for privilege tax, as a liquor dealer, and that such privilege tax is not a burden upon commerce between the states in conflict with the Federal Constitution (Rec. p. 11).

Decree.

The demurrer was over-ruled (Rec. p. 25), and the defendants having withdrawn their answer, refused to make other defense of the bills; whereupon judgment pro confessor was taken and entered against them and the decree rednered in conformity with the prayer of the bill—it being held by the learned Chancellor that complainant was engaged in inter-state business as a dealer in spiritous liquors, and that the Act of 1909, Chapter 479 had no application to such business, but that if it was susceptible of the Construction that it imposed a tax upon the business of complainant it was void because violative of the commerce clause of the Federal Constitution (Rec. pp. 25-26).

Thereupon, the defendants prayed and were granted an appeal to this Court (Rec. p. 26).

Assignment of Errors.

Come now the appellants and show that there is error in the decree of the Chancery Court of Hamilton County as follows:

78

1.

As to the privilege tax claimed by the State against the complainant, the only remedy provided for the tax payer is payment under protest and suit within thirty days to recover the same and the Chancellor erred in enjoining the Clerk of the County Court from issuing a distress warrant against the complainant for said taxes—it appearing upon the face of the bill that proceedings before the Clerk had been instituted by the Revenue Agent looking to the issuance of such warrant.

Shannon's Code, Secs. 1059, 1064, Sec. 1004.

L. & N. R. R. v. State of Tenn., 8 Heisk. 803-806.

Nashville v. Smith, 86 Tenn. 233.

Saunders vs. Rullseel, 10 Lea, 293-300.

2.

Upon the facts stated in the bill showing that the complainant is a liquor dealer in the City of Chattanooga, Tennessee, where it has its place of business, its large stock of liquors and all the paraphernalia necessary to carry on said business, and where it is engaged in carrying on the business of a liquor dealer through its officers, agents and employes, the Chancellor erred in holding (1) that the Act of 1909 Chapter 479 in so far as it imposes a tax upon liquor dealers, does not apply to the occupation and business carried on by the complainants (2) that if said act be construed to apply to

the business of complainant, as described in the bill, it is in contravention of the commerce clause of the Federal Constitution and therefore void.

3.

79 Upon the facts stated in the bill, the Chancellor erred in rendering a decree in favor of the complainant, enjoining the issuance by the Clerk of a distress warrant, and its enforcement for the state and county tax shown to be due from complainant to the state and county.

4.

Upon the facts stated in the bill the Chancellor erred in not holding and decreeing that the complainant is liable to the State of Tennessee for the privilege tax imposed upon liquor dealers by the Act of 1909, Chapter 479 and in not holding that the complainant is not such an interstate dealers as is protected by the Commerce clause of the Federal Constitution.

5.

The Chancellor erred in not dismissing complainant's bill and rendering judgment against it for the amount of the tax due the State and county, to wit the sum of \$500.00 to each.

80

Brief.

As to the first assignment of error in respect of the error of the Chancellor in enjoining the issuance of a distress warrant to collect the privilege tax due the state, we are content to submit the case upon the authorities cited in support of said assignment.

Upon the alleged merits the case presented to your Honors by complainant is in brief as follows:

The complainant is a Tennessee Corporation, with its principal office and place of business in Chattanooga, Tennessee, and that up to the first day of January 1912, it had submitted to and paid all of the privilege taxes imposed by the act of 1909, Chapter 479, upon dealers in intoxicating liquors—that it had procured and at the time of the filing of the bills in this case, held United States Revenue licenses, authorizing it to carry on the business of a dealer in spiritous liquors in Chattanooga where it, on Jan'y 1, 1912, and still had, on hand in its warehouse a large stock of spiritous liquors and that in and about its business as a liquor dealer it engaged a number of employees—the number not stated, but it is manifest that complainant has a considerable number of employees engaged in its business inasmuch as it carries a large stock of intoxicating liquors.

It is claimed that since the first day of January, 1912 it sells only to persons living outside of the state upon orders received by mail at its place of business in Chattanooga and that the goods sold in consequence of said orders are delivered to some railroad running out of Chattanooga, engaged in interstate traffic, for continuous

transportation to the purchaser outside of the state, and that the price of the liquors so sold is paid by money order or check "either at the time the order is received," or after the liquors are received by the purchaser.

Complainant says it does not intend to sell or offer to sell any liquors except as hereinbefore stated, and that its sales are
81 completed by delivery to the interstate carrier.

Upon these facts we respectfully insist that the complainant is liable for the privilege tax imposed upon liquor dealers by the Act of 1909, Chapter 479—that is, the tax imposed upon the occupation or business of a liquor dealer carried on in this State.

We submit that the material facts in this case are in no wise different from those involved in the case of *Logan vs. Brown*, Clerk, 141 S. W. 751, although in some particulars complainant has endeavored to avoid or escape the supposed effect of certain matters in that case noted by the court in its opinion, but which we submit, in no wise affected the conclusion reached by this court.

In *Logan vs. Brown*, Clerk, *supra*, after stating the facts set forth in the stipulation upon which that case was tried,—which we insist are not materially different from the case at bar—this court said:

"Neither is the complainant protected from the privilege tax by the commerce clause of the federal Constitution, in our opinion and this, we think, is true for several reasons:

"First. The liquor traffic is a well-recognized subject of police regulation. The exaction of a license fee from a liquor dealer is an ordinary exercise of police power. The mere levy of an occupation tax upon a liquor dealer, a resident of Tennessee, with his house and business established in Tennessee, even though he ships his sales to other states, cannot be held to be a regulation of commerce between the states. Certainly it is no more a regulation of commerce than the imposition of a tax upon the owners of ferried whose boats ply between landings in different states. The power of the state so to tax ferries was upheld in *Ferry Co. vs. East St. Louis*, 107 U. S. 365, 2 Supt. Ct. 257, 27 L. Ed. 419.

"A license was required in that case by the city of East
82 St. Louis, and the court said: 'The exaction of a license fee is an ordinary exercise of police power by municipal corporations. When, therefore, a state expressly grants to an incorporated city, as in this case, the power to license, tax, regulate ferries, the latter may impose a license tax on the keepers of ferries, although the boats ply between lands lying in two different states, and the act by which this exaction is authorized will not be held to be a regulation of commerce.' *Ferry Co. v. East St. Louis*, *supra*; also *Fanning v. Grezire*, 16 How. 534 14 L. Ed. 1043; *Conway v. Taylor*, 1 Black, 603, 17 L. Ed. 191."

And in this connection it is proper to note that, while the Act of 1909, Chapter 479, is commonly called the Revenue Act nevertheless, in so far as it affects liquor dealers it is expressly provided that nothing in said act contained shall authorize or legalize the sale of liquors, and it has been repeatedly held by this court that the heavy privilege tax imposed upon liquor dealers is intended to be in aid

of the statutes of this state regulating and controlling the sale of liquor.

Foster v. Speed, Clerk, 120 Tenn. 470.

Carpenter v. State, 120 Tenn. 586.

Further, after calling attention to certain phraseology of the agreed statement of facts in the Logan case, in respect to the use of the present tense—which is done in the bill in this case—the court said:

"If we concede, however, that it is intended to be said that complainant has never made sales to parties within the state, still there is no guaranty that he will continue so to exclude such parties from buying hereafter. He has his house in Tennessee, his liquors in

Tennessee, his equipment and location, and is prepared to
83 make sales in Tennessee. He is entitled, under the law, to sell his liquor for medicinal, mechanical, scientific, culinary and all other purposes, save for beverage purposes alone. Kelly vs. State (Wholesaler's Case) 123 Tenn., 516, 132 S. W. 193.

"Looking to the organization and equipment of complainant's business, it must be conceded that he is engaged in the general occupation of a liquor dealer in Tennessee. Such occupation is declared a privilege and a tax is demised by the states for its pursuit.

"The fact that particular sales so far made by him have been to non-residents does not relieve his business of the privilege tax, by reason of any provision of the federal Constitution.

"This conclusion seems to us fully warranted from the case of Ficklen v. Taxing District, 145 U. S. 1, 12 Sup. Ct. 810, 36 L. Ed. 601.

"In this case, the court considered a merchandise brokers' tax, which was imposed upon certain parties in the taxing district of Memphis, the business of one of whom was entirely between non-resident principals. Speaking of the case, the court said:

"In the case at bar, the complainants were established and did business in the taxing district, as general merchandise brokers, and were taxed as such under section 9 of chapter 93 of the Tennessee Laws of 1881, which embraced a different subject matter from section 13 of the chapter. For the year 1887 they paid the tax of \$50. charged, gave bond to report their gross commissions at the end of the year and thereupon received and throughout the entire year held, a general and unrestricted license to do business as such brokers. They were thereby authorized to do any and all kinds of commission business, and become liable to pay the privilege tax in

question. It was fixed in part and in part graduated accord-
84 ing to the amount of commissions received. Although the principals happened, during 1887, as to the one party to be wholly non-resident and as to the other largely so, this fact might have been otherwise then and afterwards, as their business was not confined to transactions for non-residents."

"The authorities are reviewed to a considerable extent, and the result of the entire case we find to be well summarized in one of the headnotes, as follows:

"A state legislature may tax trades, professions and occupations

in the absence of inhibition in the State Constitution in that regard; and, where a resident citizen is engaged in a general, subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution."

"While it is true, at the conclusion of this opinion, the following language is used:

"What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no license therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record." While it is true this language is used, it has no application here, for this complainant is no broker or agent, doing business for non-resident principals. He is a resident of Tennessee, doing business for himself in Tennessee. The circumstances that he has failed to apply for license to engage in the occupation of a liquor dealer does not determine the question whether or not he is engaged in such general occupation. We think he is so engaged, and is accordingly liable for the tax, although his sales, so far, have been to purchasers without the state.

85 "Third. The tax imposed upon complainant has reference to his business within the state, and interposes no obstacle to his sales and equipments out of the state.

"He has his business house in Tennessee, where he gathers his stock of goods. He here receives his purchase, breaks bulk, assort his stock and here keeps it. He gets his orders, prepares his shipments, delivers to the carriers, and receives his remittances in Tennessee. In fact, every detail of his business is within and under the protection of the state of Tennessee except that he makes his sales to parties without the state, and purchases his stock from outside the state which latter incident has no bearing on the controversy by reason of the provisions of the Wilson act, heretofore mentioned.

"We are of opinion that the state has a right to declare the doing of these things within her borders a privilege, and to tax such privilege accordingly.

"The state may tax a business or occupation and the fact that the stock of a particular dealer, engaged in such business or occupation, happens to have been bought and brought in from some other state will not relieve him of the tax. *Woodruff v. Parham*, 8 Wall. 123; 19 L. Ed. 382; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257.

"As was observed by the Supreme Court, in the cause of *American Steel & Wire Company v. Speed*, supra these two cases announced a doctrine years ago which has never since been questioned and has become the basis of the taxing power exerted for years by all the states of the Union. The cases themselves have been approvingly referred to in the decisions of this court too numerous to be cited."

"If a dealer, engaged in a particular business, may be required to pay a tax levied upon that business, even though he purchases all his goods without the state, we can perceive no reason why a

86 dealer, engaged in a particular business, may not be required to pay a tax levied upon that business, even though he sells all his goods without the state. The tax is no more a burden on commerce in one instance than in the other. It is not exacted of the interstate traffic in either case, but of the business in both cases.

"Upon this question, the somewhat recent holdings of the Supreme Court, in *Cargill, v. Minnesota*, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619, seems determinative.

"In that case, the state of Minnesota had passed an act regulating the business of grain elevators. Among other things it required that all persons operating such elevators should obtain a license therefor from the proper state authorities. A fee was charged for this license. Considerable business was transacted at these elevators in the way of purchasing wheat, but the entire sales of the particular elevator considered, in the case referred to were to non-residents and all its grain was sold and shipped to parties outside the state.

"It was urged upon the court that the license required of this elevator, in view of the character of business it was doing was a violation of the commerce clause of the federal Constitution.

"In response to this, the court said:

"It is also contended that the requirements of a license from the defendant company is inconsistent with the power of Congress to regulate commerce among the states. This view cannot be accepted. The statute puts no obstacle in the way of the purchase, by the defendant company, of grain in the state, or the shipments of the state of such grain as is purchased. The license has reference only to the business of the defendant at its elevator and warehouse. The statute only required a license in respect to business conducted at an established warehouse in the state, between the defendant and the sellers of grain. We do not perceive that, in so doing the
87 state has intrenched upon the domain of federal authority or regulated, or sought to regulate commerce. In no real or substantial sense is such commerce obstructed by the requirement of a license.' *W. W. Cargill Co., v. Minnesota ex rel., etc.*, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619.

"We are of opinion that the foregoing is sound authority upon which to base the conclusion heretofore announced that this complainant is only taxed with reference to matters transacted by him at his business house and as to his purchasing business and other parties of his business and does not refer to or burden his sales to parties outside the state."

It is true that in the opinion of the Logan case the Court in passing, remarked that there was no guaranty that Logan would continue to exclude persons in this State from purchasing his liquors and we assume that complainants attempted to meet this statement by its averment that it did not intend to sell or offer for sale liquors to people living in Tennessee—but even as to this there is no guaranty.

However, we submit that this question as to its intention is wholly immaterial, because the tax is not imposed or directed at a sale to a person living in another state, is not levied because of such a sale—

but is imposed upon the business or occupation carried on by complainant in Hamilton County, Tennessee.

Moreover, we respectfully submit, that it is not merely the selling of liquor that renders the complainant liable for this tax—it is immaterial whether it makes many or few or no sales—it is immaterial whether its business be successful by reason of many sales or a failure because it does not make sales, for the reason it is a tax upon the occupation or business and that tax becomes due and payable whenever a person enters upon such a business, or seeks to engage in such occupation, without regard to whether he makes a sale or not. Upon this proposition we call to the attention of your Honors the case of *Stanford v. State*, 16 Texas Appeals, 331-2, wherein among other things, it is said:

“A single sale of intoxicating liquors would not of itself constitute pursuing or following the occupation of a liquor dealer. ‘Occupation,’ as used in this statute, and as understood commonly, would signify covation, calling, trade or business which one principally engages in to procure a living or obtain wealth. It is not the sale of liquor that constitutes this offense. It is the business of engaging in the sale without paying the occupation tax. It does not require even a single sale to constitute the offense for a person may engage in the business without succeeding in it even to the extent of one sale. So, on the other hand, a person may make occasional sales of liquor without pursuing or following or intending to pursue or follow, the occupation of selling liquor.”

To further illustrate our contention, we call to your Honors’ attention the distinction which the federal government makes between its tax upon a business and the mere making of a sale.

In the case of *Ledbetter vs. U. S.* 170 U. S. 606-310 involving the liability of Ledbetter to tax imposed upon a dealer in liquors, the Supreme Court said:

“The offense does not consist in selling or offering for sale to a particular person distilled spirits, etc., in less quantities than five gallons at one time, but in carrying this on as a business; in other words, in the defendant holding himself out to the public as selling or offering for sale, etc. While it has been sometimes held that proof of selling to one person, was, at least, prima facie evidence of criminality, the real offense consists in carrying on such business and, if only a single sale were proven it might be a good defense to show that such sale was exceptional, accidental or made under such circumstances as to indicate that it was not the business of the vendor.”

We understand that the learned Chancellor predicated his decision largely upon the case of *Stockard v. Morgan*, 185 U. S. 27, but that case is clearly distinguishable from the case at bar in that the Supreme Court had before it the effect of the Revenue Act of 1899, Chapter 432, applied to brokers of merchandise, and which levied a privilege tax against such brokers in the following language—“Which shall include, when the sale is made in the state, all sellers of merchandise to consumers upon orders or samples, and also all agents engaged in such business.” (Act of 1899, p. 1017.)

The question before the Supreme Court was whether Stockard

and others who were acting solely as agents of certain non-resident merchants, were liable for this privilege tax when they solicited orders in Chattanooga, sometimes exhibiting samples for goods which were in another state and belonged to merchants whose places of business were in another state.

The controlling question before the Supreme Court of the United States for determination, and which was determined by it, is stated in the language of that Court, as follows:

“In view of these fundamental principles which are to govern, our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other states, if selling or seeking to sell their goods in such state before they are introduced therein.”

185 U. S. 32.

And it was held by the Supreme Court of the United States that this question was ruled by the Robbins case. (120 U. S. 489), and that Stockard and others merely representing non-resident owners of goods might, lawfully solicit orders for said goods in this state without becoming liable to the privilege tax imposed by the Act of 1899—that such a tax was a burden upon the non-resident owner and a restriction upon his right to sell goods in Tennessee before they were introduced into this State.

Beyond the statement just made we insist that the Stockard case does not go, and we call to the attention of your Honors that the Ficklen case, 145 U. S. 1, cited and approved in the opinion of this court in the Logan case, was not overruled but distinguished from the Stockard case, as it is clearly distinguishable in its facts, which approximate in principle the facts involved in the case at bar.

The Business of a Liquor Dealer is Essentially Local.

The Federal Government (Revised Statutes Section 3239) requires every person engaged in any business, avocation or employment, liable to a special tax—such as a liquor dealer—to post and keep conspicuously in his establishment or place of business all stamps denoting the payment of said special tax. etc., and the payment of such tax does not authorize a sale of liquor by the holder of the stamp at any other place than that named in the application, and where the same is to be kept posted.

To apply the Federal rule to the case of complainants, they are authorized to sell, under the federal license held by them only at the place where they keep their license or stamp posted, and if they make a sale elsewhere, even at the depot or from house of the railroad, where they claim that consummate the sales made by them, they violate the federal statute.

There is no such thing known to the Federal Statute as a License or Stamp Tax upon an Inter-State Dealer.

While the amount of the privilege or license tax imposed by the laws of Tennessee upon the business of a liquor dealer is found in

what is commonly known as the Revenue Act, nevertheless, as we have already shown, it is well settled in this State, that the license tax imposed upon the business of a liquor dealer is not only to raise revenue, but is intended to operate as a further police regulation over such business, which can only be carried on in some definite and fixed place.

More than half a century ago it was enacted by the General Assembly that the right to sell intoxicating liquors—that is, the right to carry on the business as a dealer in intoxicating liquors was a privilege to be exercised only after a license therefor had been procured in compliance with the terms and conditions specifically provided by the statute.

Shannon's Code, Section 1992, et seq.

By section 993 it is among other things provided that before the license issues the applicant must deliver to the clerk a sworn statement of the value of the liquors about to be offered for sale at the establishment for which he demands a license.

And so we pause to note that this court held in the case of 92 Butler v. State, 1 Shannon's Cases, that the holder of a license cannot lawfully sell liquor—that is, carry on the business of a liquor dealer, at any other place than the established named in the license. So we see that both the federal and state laws contemplate a fixed location for the business of a liquor dealer.

There is no tax, federal or state, upon the mere selling of liquor from one state to another because these excise taxes are upon the occupation or business and are directed at not only raising revenue, but the regulation of the business or avocation of dealing in liquor. And in the very nature of things a business must have not only a name but a fixed location.

The Privilege Tax Imposed by the Act of 1909 Applies to the Business of Complainant.

It is alleged in the bill that the Act of 1909 does not apply to complainant, because, as claimed by it, it is engaged in interstate commerce and to support this contention it relies upon the concluding clause of Section 13 of the Act in question.

Said Section 16 declares that it shall be a misdemeanor to exercise any of the foregoing privileges named in the act without first paying the tax prescribed for the exercise of the same, and all parties so offending shall be liable to a fine for each day such privilege is exercised without license, and concludes as follows:

"But this inhibition shall not apply to any person, firm or corporation engaged in inter-state commerce."

It is a complete answer to the insistence on behalf of complainant to point out that the words "this inhibition" apply only to the thing denounced in that section, which is the exercise of a privilege without paying the tax resulting in a fine for such failure.

93 This clause can mean nothing more. However, this question aside, we respectfully submit that it is not sought to

impose a privilege tax upon complainant for engaging in inter-state commerce. It is its business located in Chattanooga which is taxed. There is not effort to tax its inter-state sales. The sales alleged to have been made by it are not in any way connected with inter-state commerce until after they are delivered to a carrier for transportation out of the state. It is not these acts which the statute seeks to tax, but the definite fixed business in Chattanooga, and that business or occupation is not in any sense inter-state—it is not inter-state commerce but fixed and local.

The fact that the business and occupation is carried on with the ultimate purpose that the liquors are to be sold for shipment into other states does not make such business and occupation inter-state commerce. If that were so liquors manu- solely for sale and shipment into other states, could not be prohibited because such prohibition would be an interference with inter-state commerce, but this question is settled beyond contr-versy both by the Supreme Court of the United States and by this Court.

Kidd vs. Pearson, 128, U. S. 115.

Motlow vs. State, 145, S. W., 177 et seq.

In all the agitation over this question—in all the different forms of litigation growing out of this question—it has never been claimed that the business or occupation of a liquor dealer in a dry state is exempt from the laws of such state to the extent that even such business can be carried on in the dry state for sales and shipments into other states.

The nearest approach to such claim is to be found in the case of State vs. Fitzpatrick, 16 R. I. 54, which involved the storage of liquors in the state of Rhode Island, but the Supreme Court of that

94 State rejected as utterly unsound the claim of Fitzpatrick that he could keep or store liquors on his premises for sale and tra-SPORTATION into another state.

For these reasons we respectfully submit that the decree of the Chancellor should be reversed and complainant's bill dismissed.

CHAS. T. GILES, JR.,
Attorney-General.

S. M. CHAMBLISS,
Of Counsel.

95 In the Supreme Court, at Knoxville, September Term, 1912.

No. 28. Hamilton Equity.

SOUTHERN OPERATING COMPANY

vs.

W. P. HAYES, Clerk, et al.

Supplemental Brief on Behalf of the State.

We ask your Honors to bear in mind that the State does not seek to tax a sale or sales made by a liquor dealer but that the privilege

or license tax is imposed upon the business or occupation of a liquor dealer, and that it is imposed upon such business or occupation generally, and not because of any sales which may be made in the course of that business or occupation to any particular persons.

Now, that business or occupation is beyond doubt in Chattanooga, Tenn., where the liquors are stored, where the office is, where the employees of appellees are engaged at work; where appellees un-

questionably had their business and solicit orders—where
96 they receive orders and from their stock of goods draw off or separate a sufficient amount to fill the order, and where in short all of the instruments and paraphernalia necessary to make up and operate the business are engaged in — about said business or occupation.

In discussing a question similar to this, Mr. Gray, in *Limitations on Taxing Power*, etc., said:

"The location of the goods at the time the sale is negotiated is in truth the controlling fact,"

It is true that this stock of liquors, these employees and their handling of the business, and all things done in and about said business are connected with the ultimate sales to persons beyond the State, but they are in no sense a part of Inter-state Commerce. The goods themselves do not become a part of Inter-state Commerce until delivered to a carrier. The things necessary to be done before delivery to the carrier are not in any sense a part of an Inter-state transaction—or, to state it more accurately, are not Inter-state transactions. The difference between the things necessary to be done as conditions precedent to placing any commodity under the control or protection of the Inter-state Commerce clause of the Federal Constitution and Inter-state Commerce itself is clearly pointed out in—

Coe vs. Errol, 116 U. S. 517.

The Daniel Ball, 10 Wallace 557-565.

Kidd vs. Pearson, 128, U. S. 15 et seq.

Pennsylvania R. R. Co. vs. Knight, 192 U. S. 21-27-28.

In this last case, in holding that the cab service operated by the Pennsylvania railroad in connection with its trains was not engaged in Interstate Commerce though operated to carry passengers to and from Inter-state trains, the Court among other things, said (p. 28):

97 "If the cab which carries the passengers from the hotel to the ferry landing is engaged in inter-state transportation, why is not the porter who carries his traveling trunk from the room to his carriage also so engaged; if the cab service is Inter-state transportation, are the drivers of the cabs and the dealers who supply grain and hay for the horses also engaged in Inter-state Commerce? And where will the limit be placed?"

So in this case we ask: Are the drays used by these liquor dealers in carrying liquors from their warehouse to the depots engaged in inter-state transportation?

Are the employees engaged in drawing off the liquor from barrels into bottles, sealing up and packing the bottles engaged in inter-state commerce?

Is the bookkeeper and cashier, or army of clerks used in and about this business engaged in Inter-state Commerce?

The mere statement of these questions, we respectfully submit, demonstrates the absurdity of the claim advanced on behalf of the appellees.

We *has* already suggested to your Honors that except in the cases of those liquor dealers in Tennessee, since the case of *Kidd vs. Pearson*, 128 U. D. L., no dealer in intoxicating liquors has ever claimed the right to carry on the business of dealing in intoxicating liquors in one State and sell to persons living in another State without being subject to the laws of the former State.

For more than fifty years prohibition has existed in Maine and New Hampshire, and for more than thirty years in Kansas and Iowa, yet, prior to these cases, no one has ever heard the claim advanced on behalf of the liquor dealer that he might establish his business in Maine for the purpose of selling to his trade in New Hampshire, or vice versa, or that he might establish his business in Kansas and sell to his trade in Iowa or Missouri or Nebraska. We repeat that this question which has been deemed to be exclusively under the police and taxing power of the State was settled in *Kidd vs. Pearson*, *supra*.

Indeed, we have only found one case in which a dealer in any commodity claimed exemption from a tax because the articles dealt in by him were for export beyond the state.

It seems that the state of Maryland imposed a license tax on those engaged in packing and canning oysters, and in the case of *State of Maryland vs. Applegarth*, 28 L. R. A. 812, it appears that the claim was advanced by Applegarth that he was not subject to such tax because the oysters dealt in by him were for sale or transportation to other States, but the Supreme Court of Maryland held that this was immaterial, because his place of business was in Maryland, and that the license in question, which is largely a police measure of regulation, was not an unconstitutional interference with Inter-state Commerce as applied to Applegarth's business, because the oysters sold in the course of that business were for transportation beyond the limits of the State of Maryland.

Appellees Do Not Apprehend or Correctly State the Holdings of the Supreme Court of the United States in Certain Cases.

The learned counsel for appellees attempt to overturn the foundation of the decision of this court in *Logan v. Brown*, Clerk, by a specious and, as we respectfully insist, improper construction of the cases cited by this court in *Logan v. Brown*.

It is first insisted by appellees that the tax sustained by the Supreme Court of the United States in *Wiggins Ferry Co. vs. East St. Louis*, 107 U. S. 335 (27 L.'s Ed. 418), was a property tax—that is, as we understand appellees, an *advalorem* tax on property whose situs was in Illinois, and in support of such insistence appellees take an except- from the opinion, which follows the statement of the contentions made against the tax involved in that case to the effect that it was forbidden by the Federal Constitution

because (1) it is a regulation of commerce between the States; and (2) because it is a duty on tonnage forbidden by the federal Constitution. After making this statement the Supreme Court of the United States said:

"In our opinion neither of these contentions is well founded. The levying of a tax upon vessels or other water craft, or the exaction of a license fee by the State within which the property subject to taxation has its situs is not a regulation of commerce within the meaning of the Constitution of the United States."

What the court meant and all it meant was that in such cases the State might levy either a property tax, or exact a license fee in respect of the use of such property. Now if the tax had been a tonnage tax it would indeed have been a property tax, but when the Court came to discuss this question it said:

"It is next insisted by plaintiff in error that the license fee * * * is a tonnage tax which the States are forbidden to lay without the consent of Congress. This contention has no ground to rest on. In the first place the license fee is levied not on the ferry boat but on the ferry keeper. The first section of the ordinance declares that no person shall carry on any trade, business, calling or profession therein mentioned without first having obtained a license therefor", etc.

27 L.'s Edition, 423.

It is said by appellees that their construction of the Wiggins case was recognized by the Supreme Court of the United States in the case of Covington and Cincinnati Bridge Co. vs. Kentucky, 154 U. S. 205. This we deny.

In the Covington, etc., Bridge Company case was involved the right of Kentucky to fix tolls for transportation over a bridge from Kentucky to Ohio—for the transportation across said bridge not only from Kentucky to Ohio but from Ohio to Kentucky. There can be no doubt but that such transportation of freight or passengers was intercourse—traffic between the States and therefore Interstate Commerce, upon which Kentucky was seeking to levy directly a tax—or rather to fix the rate of charge for such inter-state traffic. And the Court, referring to the Wiggins case and stating what was there decided, said, (p. 221):

"Obviously the case does not touch the question here involved"—Nor did it, side or bottom.

The holding of the Supreme Court of the United States in the Wiggins Ferry Co. vs. E. St. Louis, 107 U. S. 335, can be best understood when read in connection with the case of St. Louis vs. Ferry Company, 11 Wallace, 20 L.'s Ed. 322.

Appellees insist that the case of Moran vs. New Orleans, 112 U. S. 69 (28 L.'s Ed. 655), militates against the holdings of the Supreme Court in the Wiggins Case; and upon first glance it would seem difficult to distinguish the Moran case from the Wiggins case, but when the questions before the court in the two cases are considered in respect of the facts of each the attitude and holdings of the Supreme Court of the United States become apparent.

In the Wiggins case the question was the right to a State to license a business or avocation the situs of which was within its borders, and

this right was sustained. In the Moran case was involved the right of New Orleans to impose and additional exaction in the way of a tax upon boats plying the waters of the Mississippi River and the Gulf of Mexico which had been duly licensed under the Act of Congress.

Of course the whole commercial marine—that is, the foreign and coastwise trade, of this country is placed exclusively under the control of Congress by the Federal Constitution.

And in discussing the question at issue in the Moran case the Supreme Court of the United States said:

“It is a charge explicitly made as the price of the privilege of navigating the Mississippi River between New Orleans and the Gulf of Mexico in the Coast wise trade; as the condition on which the State of Louisiana consents that the boats of the plaintiff in error may be employed by him according to the terms of the license granted under the authority of Congress. The sole occupation sought to be sub-

jected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the State thus seeks to burden with an exaction, fixed at its own measure, the very right which the plaintiff in error is entitled under and which he derives from the laws of the United States.”

And to this extent has the holding in the Moran case been construed and approved by the Supreme Court of the United States in *Harmon vs. Chicago*, 157 U. S. 407—the language of the Moran case, above set out, being quoted at page 408 by Judge Fields, in delivering the opinion of the Court.

But even the tax sought to be imposed in the Moran case would have been sustained, as intimated by the Supreme Court—if it had been a tax upon income derived from the business of the owner of the boats used in plying the waters of the Mississippi River and the Gulf of Mexico. (See *Moran vs. New Orleans*, 112 U. S. 69, 28 L.'s Ed. p. 655. The State Tax on Railway Gross Receipts, 15 Wallace 284, 21 L.'s Ed. 164.)

But said The Supreme Court, it is not a tax on the profits and income realized from the business, but an explicit charge sought to be imposed upon an occupation which could only exist and be carried on in virtue of a federal license—that is, a license navigation of the Mississippi and the Gulf of Mexico in the coast wise trade.

Gloucester Ferry Co. vs. Pennsylvania.

The case of *Gloucester Ferry Company vs. Pennsylvania*, 114 U. S. 193, 29 L.'s Ed. 158, has no application to the facts of this case when read in the light of the facts involved and the real question at issue and decided by the Supreme Court of the United States, which cannot be properly understood from the disconnected excerpts appearing in the brief filed on behalf of appellees, which do not even hint at the real question in issue and decided, but, respectfully we may say, portray, to some extent, the reasoning of Mr. Justice Fields responding to the utterly illogical argument or grounds upon which the Supreme Court of Pennsylvania predicated its holding. (114 U. S. 197-198-203-4-5.)

The material matters involved in the Gloucester case were: The Ferry Company was a New Jersey corporation, with its principal office and place of business at Gloucester, where it owned real estate, docks, etc., and its steam boats were registered by federal license at the port of Camden in the State of New Jersey. Its business consisted of ferrying freight and passengers from Gloucester to Philadelphia. It owned no property whatever in the State of Pennsylvania, but held a lease upon the dock in Philadelphia upon which it unloaded its freight and passengers, and its boats were only allowed to remain in the State of Pennsylvania long as was necessary to receive freight and passengers.

The State of Pennsylvania attempted to levy a tax upon the capital stock of the New Jersey corporation—that is the Ferry Company, and the lower court repelled the effort of the State upon the ground that there was no business carried on by the company in Pennsylvania other than the landing and receiving of freight and passengers, which is a part of the commerce of the country; but the tax was sustained by the Supreme Court of the State whose judgment was reversed by the Supreme Court of the United States. It is not necessary or helpful to notice or analyze the grounds upon which the Supreme Court of Pennsylvania sustained the tax or the answer thereof by the Supreme Court of the United States.

The real proposition involved and decided was that under the circumstances stated above the capital stock of New Jersey
104 corporation was not taxable by Pennsylvania, and that this was the true construction to be placed upon the decision of the Supreme Court is made manifest by that court in its opinion in Covington, etc., *Bridge Company vs. Kentucky*, 154 U. S. 24, 38 L.'s Ed. 962, where, in discussing the Gloucester Ferry Company, it is said:

“* * * The State of Pennsylvania attempted to tax the capital stock of a corporation whose entire business consisted in ferrying passengers and freight over the River Delaware between Philadelphia in Pennsylvania and Gloucester in New Jersey. This traffic was held to be inter-state commerce, and, in as much as it appearing that the ferry boats were registered in New Jersey and were taxable there, it was held that there was no property held by the Company which could be the subject of taxation in Pennsylvania, except the lease of a wharf in that State.”

Of course Pennsylvania could not prohibit or tax the landing of passengers within her borders. Matters of that sort affect all the States—are national in their character—and are exclusively under the control of Congress. This was the gist of the reasoning of Judge Fields in the Gloucester case, but it is apparent that it does not apply to the facts of this case, and it is not improper at this point to call to the attention of the court the language of Chief Justice Marshall in *Cohen's case*, to-wit:

“It is a maxim, not to be disregarded, that general expressions in every opinion are to — taken in connection with the case in which these expressions are used.”

105 That is, they must be read in connection with the particular facts involved, and do not apply beyond this or facts similarly conditioned.

However, as pointed out by Mr. Gray in his Limitations on Taxing Power, it may be well claimed that the scope of the holding in the Gloucester Ferry Company case is much abridged if not overruled, by a later decision of the Supreme Court of the United States in Henderson Bridge Co. vs. Kentucky, 136 U. S. 150, 41 L's Ed. 955) and it is apparent from the dissenting opinions in this last named case that the dissenting judges regarded the holding of a majority of the court as virtually overruling the principle of the Gloucester case, and that under the ruling made in the Henderson case Pennsylvania might well have taxed the intangible assets or franchise of the Gloucester Ferry Company case according to its value in Pennsylvania.

Ficklen vs. Taxing District.

This case reported in 145 U. S. (36 L's Ed. 601), we shall not further notice, because every objection made to it in the brief filed on behalf of appellees is fully met by Mr. Justice Green in his opinion in Logan vs. Brown. There is no question but that the entire business done by Ficklen was on behalf of non-resident principals and it is of no essential importance that he had applied for a license because the amount of the license fee was determinable by his commissions which were received solely from sales beyond the State.

And in this case, as stated by Mr. Justice Green in Logan's case, the circumstances that appellees failed to apply for a license
103 to engage in the occupation of a liquor dealer—which under the law they are required to do before so engaging—does not determine the question whether or not they are engaged in such general occupation. There is nothing to prevent them from making sales to this State as well as in other states—but the tax is not upon the sales but upon the occupation.

The cases of Brennan vs. Titusville, 153 U. S. 289, and Stockard vs. Morgan, 185 U. S. 35, are cases where the doctrine of the Robbins case, 120 U. S. —, was applied in behalf of agents or brokers taking orders for goods belonging to non-resident principals, and which at the time the orders were taken were not within the State seeking to impose the tax, but were beyond the borders of the State and at the domicile of the principal. Under these conditions the Supreme Court of the United States held that the State had no right to impose a tax upon the effort of a non-resident owner of goods to sell said goods in the State seeking to impose the tax when the goods themselves were beyond the confines of the State. In such cases, as said by the Supreme Court of the United States in Robbins vs. Shelby County Taxing District, 120 U. S. 497:

"But to tax the sale of such goods or the offer to sell them, before they are brought into the State, is a very different thing, and seems to us clearly a tax on Inter-state Commerce itself."

Cargill vs. Minn.

This case reported in 180 U. S. 452, is referred to by Mr. Justice Green in his opinion in the Logan case, and the real point in issue,

in so far as the commerce clause of the Federal Constitution is involved, is correctly stated by Judge Green—it fully sustains our contention in this case, and we content ourselves with the conclusion reached and stated by Judge Green.

After all, as stated by Mr. Gray:

“The location of the goods at the time the sale is negotiated is in truth the controlling fact.”

This is manifest from a consideration of the particular facts involved in such case.

In the Wiggins case, *supra*, the Illinois corporation, domiciled in E. St. Louis, and having the situs of its property there, was held liable for a license or occupation tax imposed upon its business, notwithstanding that this business included the operation of boats engaged in interstate traffic.

In the American Steel and Wire Co. Case, 192 U. S. 500, affirming the decision of this court in 110 Tenn. 524, the property which occasioned the claim of Tennessee to a merchant's tax against the American Steel & Wire Company, was, for convenience, assembled at Memphis for shipment into other states, pursuant to orders received by the company prior to the shipment to and assembling at Memphis.

It is true that small parts of the sales made by the Steel & Wire Company from its place of business or ware-house in Shelby County were to dealers within the State of Tennessee, but fully 90 per cent was to dealers beyond the limits of the State, the proportion of interstate sales to domestic sales being clearly set out in the opinion of the court.

But we call your Honor's attention that wherever the Federal commerce clause applies, it matters not whether the burden be great or small, if that clause had any sort of application to sales from a business in Tennessee to consumers living in Arkansas, Mississippi and Louisiana upon orders sent in by mail by them to Memphis, the merchant's tax sought to be enforced against the Steel & Wire Company could not have been sustained by the Supreme Court of the United States.

The merchant's tax and the privilege tax, under the Constitution of this State are under the full control of the legislature—they apply to a business and not to the goods or articles of commerce themselves, and it was this application of the merchant's tax—not different in principle under our scheme of taxation from the privilege tax—which the Supreme Court of the United States sustained in the Steel and Wire Company case regardless of the fact that it applied to a business 90 per cent of which consisted of inter-state sales. It will not do to say that the reason why the Supreme Court of the United States sustained the merchant's tax in the Steel and Wire Company case was because the business is indivisible, and that a little part of it consisted in sales to consumers within the State, because in the manner of ascertaining the merchant's tax applicable to the capital invested in the business of the merchant, that part invested for inter-state sales is easily separable from that part invested for domestic sales. So that, the Supreme Court, if there had been nothing at all

in the question, could have easily separate that part of the tax on capital invested in interstate sales from the other part and as to such capital or inter-state sales held the tax invalid, but it sustained the whole tax because it was levied upon the business of a merchant carried on in Shelby County Tennessee.

In the case of *General Oil Company vs. Crain*, 209 U. S. 211-228, the proposition here contended for was sustained by the Supreme Court of the United States. In this case it appears that the Oil Company, a Tennessee corporation, doing business at Memphis, had wells and reservoirs in the State of Pennsylvania and Ohio from which it procured its supplies of oil. At Memphis the oil company used different tanks for storage purposes, and in tank number one was kept oil for which orders had been received from

the states of Arkansas and Mississippi before the shipment of
109 of the oil from said manufacturing plants, and such oil was placed in said tank number 1 for the purpose of distribution into smaller vessels intended for shipment into other States, and was kept separate from oil sold for use in Tennessee. The oil company claimed that it was protected from the Tennessee Inspection Act by the commerce clause of the Federal Constitution, because, particularly as to tank number one, the oil has been sold prior to its shipment from manufacturing plants, and that stoppage in Memphis was merely temporary and for the purpose of separating the oil and putting it in convenient receptacles in which the transit or shipment began in Pennsylvania and Ohio was to be continued to the States of Arkansas and Mississippi. It is to be noted that this oil was not to be sold for consumption in Tennessee but for shipment into other States. However, the Supreme Court held that notwithstanding it had been sold for shipment into other States, it was not Inter-state Commerce, but was subject to the Tennessee Inspection Act, and that the inspection fee so levied upon this oil intended solely for shipment into other States—and actually sold to parties living in other States—is not a burden upon inter-state commerce.

In the case of *Emert vs. Missouri*, 158 U. S. 293, that astute interstate commerce lawyer, Mr. Lawrence Maxwell, contended that the right of sale free of an occupation or license tax inhered in property which the Singer Sewing Machine Company had the right, under the commerce clause of the federal Constitution, to bring into the State of Missouri. In other words, it was contended that the Singer Sewing Machine Company having the right to bring these goods into the State of Missouri, had the right to sell them there without any burden thereon, otherwise the right to bring them into the State of Missouri would be valueless, so that the occupation tax was, as contended by Mr. Maxwell, a burden upon the right which the Singer Sewing Machine Company enjoyed under the federal Constitution of bringing its property into the State, but this contention was denied by Mr. Justice Gray in an opinion which reviews practically all of the

the authorities upon this question beginning with the case of
110 *Brown vs. Maryland*, 12 Wheaton, 419, which involved purely a question of a discriminating tax against importers, and reached the conclusion that wherever goods have become inter-

mingled with the general mass of property in the state—as were the case of appellees in this case—the State had full control thereof, and might tax not only the goods but any business or occupation in relation to such goods.

As stated by Mr. Justice Green, in the Logan case:

“If a dealer engaged in a particular business may be required to pay a tax levied upon that business, even though he purchased all his goods without the State, we can perceive no reason why a dealer engaged in a particular business may not be required to pay a tax levied upon that business, even though he sells all his goods without the State. Tax is no more a burden on commerce in one instance than in the other. It is not exacted on the inter-state traffic in either case, but on the business in both cases.”

This would seem to be conclusive of the entire question.

In Conclusion.

In conclusion, we respectfully submit:

(1). That this is not the case—*as* was Moran's *supra*—of a State attempting to exact an additional tax from an occupation which could be carried on solely under the authority of a federal license, that is, operating a boat engaged in the coastwise commerce of this country.

(2). It is not a case—such as Covington Bridge Co. vs. 111 Kentucky, *supra*, and St. Clair County vs. Inter-state Sand and Car Transfer Company, 192 U. S. 454—where a state seeks to regulate the tolls and charges for inter-state traffic and commerce.

(3). It is not a case—such as the Robbins case, *supra* and other cases following it—where the State seeks to impose a tax for soliciting orders for goods in another State belonging to a non-resident principal or owner.

(4). But it is a case where the State merely seeks to impose a tax upon a business conducted within her borders in respect of property and agencies, all of which are within her borders and a part of the common mass of property in the State. We respectfully submit that this last proposition applies to any business covering any sort of commodity and is therefore of the greatest importance to the people of this state. However, we may be pardoned for going further and respectfully submitting to the court that even if this last proposition were not applicable to any business in respect of any commodities, nevertheless, under the principles announced by the Supreme Court of the United States in the case of Delamater vs. South Dakota, 205 U. S. 93, it is peculiarly applicable to the liquor business.

We invite the attention of your Honors to the reasoning of Mr. Justice White, now Chief Justice, in the Delamater case, where he applied the principle of the Wilson Act, though the letter of such Act applied only to liquors imported into a State. Mr. Justice White shows the clearest, soundest reasons for applying it to the business of soliciting orders for liquors at the time the orders were

solicited were beyond the borders of the State and belonged to a non-resident owner.

Among other things he says (p. 97) :

"The general power of the States to control and regulate the business of dealing in or soliciting proposals within their borders
112 for the purchase of intoxicating liquors is beyond question."

The business of appellees carried on in Chattanooga at their place of business there consists of many local acts such as looking after the stock, receiving orders therefor—or sending out solicitations for proposals of orders—the separation of the liquors covered by any order received from the general mass of the property, arranging it for shipment and all the things usually done in and about a business. And it is such a business as we respectfully insist that Mr. Justice White had in mind when he said that the general power of the State in respect of this business is unquestioned.

In the Delamater case, the South Dakota Act, although in terms a taxing statute, was sustained as a police regulation, but the Supreme Court of the United States in *Phillips vs. Mobile*, 208 U. S. 472, 479, 480, sustained, under the authority of the Wilson act, a taxing statute applicable to liquors which but for the Wilson Act would have been in contravention of the commerce clause of the Federal Constitution. So that, The Wilson Act protects both police regulations and the efforts of State to tax the liquor business. However, if there were any questions about this matter the taxing statutes of this State imposing privilege taxes upon liquor dealers are in the nature of police regulations as they were found to be in the Delamater case.

Respectfully submitted,

(Signed)

CHAS. T. CATES, JR.,

Attorney General.

113 Filed Dec. 2nd, 1912. S. E. Cleage, Clerk.

In the Supreme Court of Tennessee, September Term, 1912.

SOUTHERN OPERATING Co.

vs.

W. P. HAYS, Clerk, et al.

Chancery Court, Hamilton County.

Opinion.

Complainant, a corporation, brings the bill in this case against W. P. Hays, Clerk of the County Court of Hamilton County, and others, to enjoin the issuance of a distress warrant against it, to be levied upon its property to collect privilege taxes alleged to be due from it to the State of Tennessee and Hamilton County, for exercising the business or occupation of a liquor dealer in the said County of Hamilton and State of Tennessee, imposed by the general revenue laws of the State of Tennessee.

The case was heard by the Chancellor upon bill and demurrer, and therefore the facts are to be taken as true as set forth in complainant's bill. The Chancellor overruled the demurrer, and the defendants, failing to make defense by answer, the bill was taken as confessed, and a final decree entered granting the complainant full relief according to the prayer of its bill. The defendant- have appealed to this court and assigned errors.

114 We have carefully considered the allegation of complainant's bill, and we see nothing in *their* case there made to differentiate it from that of Logan vs. Brown, decided by this court at its September Term 1911, the opinion being reported in 141 S. W. R. 751, and 125 Tenn., —. We are entirely satisfied with the conclusions of law reached in that opinion and adhere to them. The cases are — similar that it is not necessary to here state either the facts of this case or the law applicable to them, as held in Logan vs. Brown, but a mere reference to the opinion in that case is sufficient for all purposes.

It was in that case held, that the privilege tax imposed by the revenue laws of Tennessee, upon the business or occupation of a liquor dealer, within the state, was valid and collectible, notwithstanding the dealer may make sales beyond the limits of the state, which were interstate commerce. It is the doing of the business in Tennessee, the following of the occupation of a liquor dealer here, that is taxed, and not the sales made by him in other states.

The first assignment of error must also be sustained.

The injunction issued by the court below in so far as it was directed at restraining the amount of the privilege tax due the State was improvidently granted. The only remedy provided for the taxpayer desiring to contest the legality of a tax due the State is payment under protest, and suit to recover the amount of the tax within thirty days. Shannon's Code, Sections 1059-1064; Nash v. Smith, 86 Tenn, 213; Saunders v. Russell, 10 Lea, 293-300; L. & N. R. R. Co. v. State, 8 Heisk., 803-806.

The bill alleges that the distress warrant sought to be enjoined was issued for one-fourth of the annual tax. This was done under a misconception of the effect of the Act of 1883, Chapter 29, making it lawful for Clerks of the various County Courts to issue licenses by the quarter. However, this is an annual tax, and unless the person desiring to engages in a privileged occupation elects to take advantage of the provisions of said Act of 1883, and to pay

115 one-fourth of the tax in advance, the effect of engaging in such occupation without strictly complying with the terms of the statute and payment in advance of one-fourth of the annual tax, is to make him liable for the whole of the tax—that is the annual tax, which is indivisible, except it be paid in the manner provided in the Act of 1883. So that the complainant, having engaged in an occupation and business which rendered it subject to the privilege tax, it was the duty of the County Court Clerk to issue a distress warrant for the entire annual tax. However, no question seems to have been made on this point by complainant, doubtless because the issuance of a distress warrant for one-fourth of the amount of the tax was to its advantage and benefit.

It results that the decree of the Chancellor is erroneous, and the same will be reversed and complainant's bill dismissed, with costs.
SHIELDS, C. J.

116 Supreme Court of Tennessee, at Knoxville, September Term, 1912.

TUESDAY, November 12, 1912.

Court met pursuant to adjournment present and presiding the Honorable Chief Justice John K. Shields and Honorable Associate Justices M. M. Neil, D. L. Lansden, and Arthur S. Buchanan.

The minutes of yesterday were read and signed when the following proceedings were had, to-wit:

SOUTHERN OPERATING COMPANY

vs.

W. P. HAYS, Clerk.

Reversed and Remanded.

Be it remembered that this cause came on to be heard on this the — day of November, 1912, before the Honorable The Judges of the Supreme Court of Tennessee, upon the transcript of the record from the Chancery Court of Hamilton County, the assignment of errors on behalf of the appellants W. P. Hays, Clerk of the County Court of Hamilton County, and J. Parks Worley, Revenue Agent for the State, and the reply Brief thereto by the appellee Southern Operating Company, and the Court being of the opinion that the case made by complainant's bill is not different in principle from that made in the case of Logan vs. Brown, Clerk, decided in this court at its September Term, 1911, the opinion being reported in 141 Southwestern Reporter 751, and 125 Tennessee —, and that this case is ruled by the conclusions reached by this court in said case of Logan vs. Brown, and the Court being further of the opinion that there is error in the decree of the Chancellor in not sustaining the demurrer on the ground that an injunction will not lie to restrain the collection of revenue due the State and in not following and applying to the facts alleged in the bill the principles and holding of this court in Logan vs. Brown, Clerk, and that the assignment of errors filed on behalf of appellants is well taken and should be sustained, and that the decree of the Chancellor should be reversed, it is accordingly so ordered, adjudged and decreed.

117 And the Court being further of the opinion that the demurrer interposed by the defendants in the lower court was well founded, it is therefore ordered, adjudged and decreed that the same be and hereby is sustained and complainant's bill is dismissed, except in so far as it may be necessary to retain the same in order to collect the amount due to the State of Tennessee and County of Hamilton from complainant carrying on the business and occupation of a liquor dealer in Hamilton County, Tennessee, and for this

purpose this cause is remanded to the Chancery Court of Hamilton County in order that there may be a reference to ascertain the amount of damages suffered under the injunction issued in this cause, and for proper proceedings against complainant and its sureties on the injunction bond. It is further decreed that the injunction be and the same is hereby in all things dissolved.

It is further ordered, adjudged and decreed that the complainant Southern Operating Company and Paul Heymann and H. W. Steiner, its sureties on prosecution bond, pay all the cost of this cause, for which execution may issue.

118 STATE OF TENNESSEE,

Office of Supreme Court Clerk, at Knoxville:

I, S. E. Cleage, Clerk of the Supreme Court at Knoxville, do hereby certify that the above and foregoing is a full, true, and perfect copy of the record, including the pleadings, decree of the Chancellor, assignments of error and brief of Appellant, Reply brief of Appellee and the opinion and decree of the Supreme Court, as the same appears of record in my office in the cause Southern Operating Company vs. W. P. Hays, Clerk.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office in Knoxville, Tennessee, on this December 17th, 1912.

[Seal of the Supreme Court, Knoxville, Tenn.]

S. E. CLEAGE, *Clerk.*

119 In the Supreme Court of the State of Tennessee, at Knoxville, Tennessee.

THE SOUTHERN OPERATING COMPANY, a Corporation Chartered under the Laws of Tennessee, with an Office and Resident Agent at Chattanooga, Hamilton County, Tennessee, and Paul Heyman and H. W. Steiner, Citizens and Residents of Hamilton County, Tennessee, All Citizens of the United States of America, Plaintiffs in Error,

VS.

W. P. HAYS, Clerk of the County Court of Hamilton County, Tennessee, and J. Parks Worley, Revenue Agent for the State of Tennessee, All Citizens and Residents of the United States of America, Defendants in Error.

Petition for Writ of Error.

To the Honorable John K. Shields, Chief Justice of the Supreme Court of Tennessee:

Petitioners, Southern Operating Company, a corporation chartered under the laws of Tennessee, with an office and resident agent in Hamilton County, Tennessee, appellees below, and Paul Hey-

120 man and H. W. Steiner, citizens of Hamilton County, Tennessee, sureties below on the cost and injunction bonds of the aforesaid petitioners; all citizens of the United States of America, by their attorneys, Littleton, Littleton & Littleton; Pritchard, Allison & Lynch, and Williams & Lancaster, respectfully show:

(1) That on or about the 15th day of January, 1912, petitioner Southern Operating Company, filed a bill in the Chancery Court of Hamilton County, Tennessee, being a court having original jurisdiction of the subject matter, against the defendants in error herein, in which said bill they alleged in substance: (a) That said J. Parks Worley, Revenue Agent of the State of Tennessee, and said W. P. Hays, County Court Clerk of Hamilton County, Tennessee, under color and authority of Chapter 479 of the Acts of the General Assembly of the State of Tennessee of 1909 (which said Act declares certain occupations "privileges," fixes the rate of taxation on same, and prohibits the carrying on of such business without first paying the tax prescribed) and laws passed pursuant thereto, had threatened and were immediately about to assess petitioner with said State privilege tax provided by said Act in the sum of \$500.00; and with a privilege tax in a like sum provided for the County of Hamilton by laws passed pursuant to said Chapter, for the year beginning January 1st, 1912, together with costs and penalties for failure to pay the same; and had threatened, were about to, and would, unless enjoined from so doing, immediately issue distress warrants in twice the sum of the taxes claimed, together with costs, and penalties, and place the same in the hands of Sam A. Connor, Sheriff of Hamilton County, Tennessee, for collection. (b)

121 That, unless prohibited by the injunctive process of the Chancery Court, petitioner would suffer irreparable injury; and to have its rights in the premises adjudicated, a multiplicity of suits would be necessary; that petitioner had no plain, adequate and complete remedy at law. (c) That petitioner was, and is engaged exclusively in the business of carrying on interstate commerce, its manner of doing business being set out in detail in the bill; and was, and is, within the protection of Article One, Section 8, Sub-section 3 of the Constitution of the United States. (d) That said Act of 1909, and the laws passed pursuant thereto, have no application to petitioner or its business; but if said Act and said laws imposing said privilege taxes be construed as applying to petitioner or its business, said Act and said laws to the extent that they apply to petitioner or its business, and persons of a like class, and the acts and threatened acts of the defendants in error, by and under color of the same, are void and contravene Article One, Section 8, Sub-section 3 of the Constitution of the United States, and the laws passed pursuant thereto, vesting in Congress the exclusive power to regulate commerce between the states; and work a deprivation of petitioner's rights as guaranteed by said provision of the constitution. And petitioner expressly pleaded and relied upon said provision of the Constitution. (e) Petitioner prayed: (First) for a temporary and permanent injunction against the assessment and collection of said County tax; and likewise; (second) for a

temporary and perpetual injunction against the assessment and collection of said State tax. Injunctions were granted as
122 prayed, and petitioners, Paul Heyman and H. W. Steiner, became sureties on the injunction and cost bonds for petitioner.

(2) The defendants in error filed three demurrers to the bill. The first attacked only so much of the bill as sought to enjoin the assessment and collection of the State tax on the ground that under the laws of the State of Tennessee, an injunction will not lie to restrain the assessment or collection of a State tax. The second demurrer challenged the relief sought as to both State and County taxes on the ground that the privilege tax in question as applied to petitioner, and its business was not a burden on interstate commerce, or in conflict with the Federal Constitution. The third demurrer attacked only so much of the bill, as predicated relief upon the allegation that the tax in question was so large as to be confiscatory, on the ground that the amount of the tax was wholly immaterial. Amongst numerous other allegations charging threatened irreparable injury, multiplicity of suits, and "no plain, adequate and complete remedy at law," the bill incidentally alleged that the tax in question was so large as to be confiscatory. This demurrer could have been sustained without affecting the bill, or petitioner's rights to the relief therein prayed; but the draughtsman, clearly, filed it out of an abundance of caution, under a misconception of the theory of the bill, and it was not noticed in the assignment of errors, in the appellate court, or in the argument before, or opinion of, that Court, and need not further be considered.

123 (3) The Chancellor overruled the demurrers and defendants in error, having in open court refused to plead further, the bill was taken for confessed, and judgment pro confesso entered, and final decree rendered and entered in accordance with the prayer of the bill, perpetually enjoining the assessment and collection of: (a) The County tax; and, (b) the State tax; and, (c) adjudging the costs of the cause against the defendants in error.

(4) From this decree defendants in error, in due and proper form, appealed to the Supreme Court of Tennessee, that court being the highest court of Law or Equity in the State of Tennessee in which a decision of this cause could be had. In said Supreme Court five errors were assigned to the action of the Chancellor, in substance to-wit: The Chancellor erred in holding (first) That the Acts of 1909, Chapter 479, and the laws passed pursuant thereto, do not apply to petitioner, or the occupation and business carried on by it; that (second) said Act and said laws, if construed to apply to petitioner or its business as described in the bill, contravene the Commerce Clause of the Federal Constitution and are void; that (third) petitioner is engaged exclusively in the business of carrying on interstate commerce within the protection of the Commerce Clause of the Federal Constitution; and, therefore, erred (Fourth) in granting the relief prayed, both as to the State and County

taxes; and (Fifth) as to the State tax, even if the same be void, the Chancellor erred in enjoining the same.

(5) Said cause came on for final hearing on or about the 12th day of November, 1912, when the Supreme Court of Tennessee rendered final judgment against your petitioners, sustained said assignment of errors, denied the relief prayed, dissolved the
124 injunctions granted, reversed the decree of the Chancellor, dismissed petitioner's bill, rendered judgment against petitioner and its said sureties, said Paul Heyman and H. W. Steiner, for the costs of the cause, and awarded an execution for the same. The Court remanded so much of the cause to the Chancery Court of Hamilton County, Tennessee as might be necessary to enable the defendants in error to collect from petitioner and its said sureties on the injunction bond, such damages as may have been sustained by defendants in error incident to the alleged wrongfully suing out of the injunction. This latter action of the Court was not prayed or asked in any of the pleadings in the cause and was purely and clearly incidental to the execution of the final decree of the Court hereinabove set out.

(6) In said cause, both in the lower court and in the Supreme Court, petitioner expressly drew into question the validity of said Chapter 479 of the Acts of 1909, of the State of Tennessee, and laws passed pursuant thereto, as applied to petitioners and their business, and the authority exercised, and attempted to be exercised under and by virtue of same by defendants in error, on the ground that said State laws and said authority exercised thereunder were repugnant to said Article One, Section 8, Sub-section 3 of the Federal Constitution; and specially set up and claimed the right and privilege under said provision of the Constitution and laws passed pursuant thereto, to carry on their said business free from the burdens and restraints imposed, and attempted to be imposed, by said State laws, and under authority of same. The said Supreme Court of Tennessee decided in favor of said State
125 laws, and the authority defendants in error exercised thereunder, and denied to petitioners the rights, privileges and immunities claimed under said provision of the Federal Constitution. And, in resolving the issues in said cause against petitioners, it was necessary for said Court to sustain the validity of said State laws and the authority exercised under the same, and to deny to petitioner the rights and privileges claimed under said provisions of the Federal Constitution.

(7) Petitioners further show the Court that the sole relief sought and prayed in their said bill was, and is an injunction against the assessment and collection of said County tax; and against the assessment and collection of said State tax. That unless your Honor revive said injunction, pending the final decision of the Supreme Court in this cause, or issues a restraining order, or otherwise preserves matters in statu quo, said former injunction being now dissolved, said defendants in error will immediately proceed to assess, and thereupon destrain, levy and collect, said tax, and the relief sought by petitioners, regardless of the decision of the Supreme

Court of the United States, will be defeated, and, in addition to the many hardships alleged in the bill, petitioners will be compelled, by a multiplicity of suits, to relitigate the same matters, and will otherwise suffer irreparable injury.

Wherefore your petitioners present herewith an exemplified transcript of the record of the Supreme Court of Tennessee, in said cause, together with an assignment of errors, prayer for reversal, costs and supersedeas bonds, and pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Tennessee at Knoxville, Tenn., and the judges thereof, to the end that said record in said matter may be removed into the Supreme Court of the United States, and that the errors complained of may be examined, reviewed and corrected in the Supreme Court of the United States and that the judgment aforesaid in said Supreme Court of the State of Tennessee may be reversed.

And, your petitioners further pray that citation be granted and signed; that the bonds herewith presented be approved; and that, upon complying with the terms of the statute in such cases made and provided, said bond and writ of error may operate as a supersedeas; and that your Honor enter an order reviving the injunction granted by the Chancellor in this cause, or, in lieu thereof, grant a restraining order, preserving matters in statu quo, pending the final decision of this cause by the Supreme Court of the United States.

SOUTHERN OPERATING CO.,

PAUL HEYMAN,

H. W. STEINER, *Petitioners,*

By JESSE M. LITTLETON,

Attorney at Law and in Fact for Petitioners.

LITTLETON, LITTLETON & LITTLETON,

WILLIAMS & LANCASTER,

PRITCHARD, ALLISON & LYNCH,

Attorneys for Petitioners.

STATE OF TENNESSEE,

County of Hamilton:

Before me, the undersigned Chas. M. Fain, a duly commissioned, qualified and acting Notary Public, in and for the State and County aforesaid, authorized by law to take and administer oaths, personally appeared C. S. Littleton, one of the solicitors for petitioners

127 in this cause, who makes oath *oath* that he is peculiarly cognizant of the facts stated in the foregoing petition; and that they are true to the best of his knowledge, information and belief.

C. S. LITTLETON.

Sworn to and subscribed before me this 30th day of December, 1912.

[Seal Chas. M. Fain, Notary Public, Hamilton Co., Tenn.]

CHAS. M. FAIN,

Notary Public in and for Hamilton County, Tennessee.

Fiat: The writ of error prayed for in the foregoing petition is hereby allowed on this the 9th day of January, 1913, the writ of error to operate as supersedeas, and the bond for that purpose is fixed at the sum of \$500.00 Dollars. The Clerk is further directed to issue injunction as prayed for in the petition upon the execution of proper additional bond in the sum of \$500.00 Dollars, with good and solvent sureties.

Dated this the 9 day of Jan'y, A. D. 1913.

JNO. K. SHIELDS,
*Chief Justice of the Supreme Court
of Tennessee.*

Filed in my office this the 11th day of January, 1913.

S. E. CLEAGE,
Clerk of the Supreme Court of Tennessee.

127½ In the Supreme Court of the State of Tennessee, at
Knoxville, Tennessee.

THE SOUTHERN OPERATING COMPANY, PAUL HEYMAN, and H. W.
STEINER, Plaintiffs in Error,

vs.

W. P. HAYS, Clerk of the County Court, etc., and J. PARKS WORLEY,
State Revenue Agent, etc., Defendants in Error.

Assignment of Errors.

Now come said plaintiffs in error, and respectfully submit, that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Tennessee, in the above entitled matter, there is manifest error in that, to-wit:

I.

The Court erred in holding that Chapter 479 of the Acts of the General Assembly of the State of Tennessee, for 1909, and the laws of Hamilton County, Tennessee, passed pursuant thereto, are, as applied to plaintiff in error, Southern Operating Company, and its business, and persons and businesses of a like class, valid and not repugnant to, or in violation of, Article One, Section 8, Sub-section 3, of the Constitution of the United States.

II.

The Court erred in holding that the authority exercised, and attempted to be exercised, by the defendants in error, and their acts and threatened acts in the premises, under and by virtue of said Chapter 479 of the Acts of the General Assembly of the State of Tennessee, for 1909, and the laws of Hamilton County, Tennessee, passed pursuant thereto, in threatening and attempting to assess, levy and collect from plaintiff in error, Southern Operating Company, as aforesaid, said State and County privilege taxes, and each of them, and the costs, fees, penalties, etc., thereto annexed, au-

thorized and prescribed, were valid, and not in violation of Article One, Section 8, Subsection 3 of the Constitution of the United States.

III.

The Court erred in denying to plaintiff in error, Southern Operating Company, the rights, privileges and immunities claimed by it under said provision of the Federal Constitution: (a) as to the State tax; (b) as to the County tax.

IV.

129 The Court erred in holding that the plaintiff in error, Southern Operating Company, was not engaged exclusively in the occupation of carrying on interstate commerce; and that said tax upon its said occupation did not impose a burden upon interstate commerce within the meaning of said provision of the Federal Constitution.

V.

The Court erred in denying the relief prayed as to the County tax, and in dismissing the bill as to the same.

VI.

The Court erred in denying the relief prayed against the assessment of the State tax, and in dismissing the bill as to the same.

VII.

The Court erred in denying the relief sought as against the collection of the State tax, and in dismissing the bill as to the same.

VIII.

The Court erred in: (a) Reversing the decree of the Chancellor, dissolving the injunction, dismissing the bill, sustaining the demurrers, sustaining the assignments of error, rendering judgment against plaintiff in error, the said Southern Operating Company, and its sureties, Paul Heyman and H. W. Steiner, for the cost of the cause, and awarding execution upon the same: (first) as
130 to so much of said bill as sought relief against the assessment and collection of the County tax; (second) against so much of the bill as sought to enjoin the assessment of the state tax; and (third) as to so much of the bill as sought to enjoin the collection of the State tax. (b) And in remanding so much of the cause to the Chancery Court of Hamilton County, Tennessee, as was necessary to enable the defendants in error to take such proceedings as might be proper to collect from plaintiff in error, and its sureties on the injunction bond, such damages as may have been sustained by the defendants in error incident to the alleged wrongful suing out of said injunction: (First) as to so much of the bill as sought relief against the County tax; and (second) as to so much of the bill as sought relief against the assessment of the State tax; and

(third) as to so much of the bill as sought relief against the collection of the State tax.

Wherefore plaintiffs in error pray that the errors above assigned may be inquired into by this Court and the same corrected in accordance with law.

LITTLETON, LITTLETON & LITTLETON,
WILLIAMS & LANCASTER,
PRITCHARD, ALLISON & LYNCH,
Attorneys for Petitioners.

130½ To the Honorable the Supreme Court of the United States:

SOUTHERN OPERATING COMPANY, and PAUL HEYMAN and H. W. STEINER, Plaintiffs in Error,

vs.

W. P. HAYS, Clerk of the County Court, etc., and J. PARKS WORLEY, State Revenue Agent, etc., Defendants in Error.

Come the plaintiffs in error, Southern Operating Company, and Paul Heyman and H. W. Steiner, and pray that the judgment of the Supreme Court of the State of Tennessee, rendered against them in this cause, and entered on or about the 12th day of November, 1912, may be reversed for the reasons set out and alleged in the foregoing assignment of errors; that said errors may be corrected; and that plaintiffs in error may be given such other and further relief as may be necessary to the ends of justice.

LITTLETON, LITTLETON & LITTLETON,
WILLIAMS & LANCASTER,
PRITCHARD, ALLISON & LYNCH,
Attorneys for Plaintiffs in Error.

131 In the Supreme Court of the State of Tennessee, at Knoxville, Tennessee.

SOUTHERN OPERATING COMPANY, and PAUL HEYMAN and H. W. STEINER, Plaintiffs in Error,

vs.

W. P. HAYS, Clerk of the County Court, etc., and J. PARKS WORLEY, State Revenue Agent, etc., Defendants in Error.

The above entitled matter coming on to be heard upon the petition of the plaintiffs in error therein, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Tennessee, and, upon examination of said petition, and the record in the matter, and, desiring to give the petitioners an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter:

It is Ordered, That a writ of error be, and is hereby allowed to this Court from the Supreme Court of the United States, and, upon

petitioners executing good and solvent bond in the penal sum of \$500 Dollars, conditioned as required by law, said writ of error and bond shall operate as a supersedeas.

JNO. K. SHIELDS,

*Chief Justice of the Supreme Court
of the State of Tennessee.*

132

Writ of Error.

THE UNITED STATES OF AMERICA, vs:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Tennessee, Greeting;

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Tennessee, at Knoxville, Tennessee, before you, or some of you, being the highest Court of law or equity of the said State, in which a decision could be had in the said suit, between the Southern Operating Company, Paul Heyman and H. W. Steiner, Plaintiffs in Error, and W. P. Hays, County Court Clerk of Hamilton County, Tennessee, and J. Parks Worley, State Revenue Agent of the State of Tennessee, Defendants in Error, (the defendants in error herein named being the appellants in the Supreme Court of the State of Tennessee, aforesaid; and the plaintiff in error, Southern Operating Company, herein mentioned being the appellee in said Court; and the plaintiffs in error, Paul Heyman and H. W. Steiner, being joint defendants with Southern Operating Company to the judgment for costs of the Supreme Court of Tennessee, by reason of their being sureties on the cost bond for said Southern Operating Company), wherein was drawn in question the validity of a statute of, and an authority exercised under, said State on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of their validity; and, wherein was

132½ drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege or exemption specially set up and claimed under such clause of the said Constitution; a manifest error hath happened to the great damage of the said Southern Operating Company, Paul Heyman and H. W. Steiner, as by their complaint appears: we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-and you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 11th day of February, 1913, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 11th day of January in the year of our Lord one Thousand Nine Hundred Thirteen, and of the Independence of the United States, One Hundred Thirty-seventh.

[Seal District Court of the United States, Eastern District of Tennessee.]

HORACE VAN DEVENTER,
Clerk of the District Court of the United States
for the Eastern District of Tennessee.

Allowed by:

JNO. K. SHIELDS,
Chief Justice of the Supreme Court
of the State of Tennessee.

133 In the Supreme Court of the State of Tennessee, at Knoxville, Tennessee,

SOUTHERN OPERATING COMPANY, PAUL HEYMAN, and H. W. STEINER, Plaintiffs in Error,

vs.

W. P. HAYS, Clerk of the County Court, etc., and J. PARKS WORLEY, State Revenue Agent, etc., Defendants in Error.

Bond.

Know all men by these presents, That we, the Southern Operating Company, as Principal, and Maryland Casualty Company as sureties, are held and firmly bound unto W. P. Hays, County Court Clerk, and J. Parks Worley, State Revenue Agent, of the State of Tennessee, in the penal sum of Five hundred (\$500.00) Dollars, to be paid to the obligees, their successors, representatives and assigns, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents:

Sealed with our seal and dated this 11th day of January A. D. 1913.

134 Whereas, the above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Tennessee;

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its writ of error to effect, and answer all costs and damages if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

SOUTHERN OPERATING CO.,
By LEE BLUM, Sec'y.

[Seal Maryland Casualty Company, Incorporated.]

MARYLAND CASUALTY COMPANY,
ABE BROWN AND
J. B. MILLIGAN,
Attorneys in Fact.

I hereby approve the foregoing bond and sureties on this the 11th day of January, A. D. 1913.

JNO. K. SHIELDS,
Chief Justice of the Supreme Court
of the State of Tennessee.

135 In the Supreme Court of the State of Tennessee, at Knoxville, Tennessee.

SOUTHERN OPERATING COMPANY, PAUL HEYMAN, and H. W. STEINER, Plaintiffs in Error,

vs.

W. P. HAYS, Clerk of the County Court, etc., and J. PARKS WORLEY, State Revenue Agent, etc., Defendants in Error.

Bond.

Know all men by these presents, that we, Paul Heyman, and H. W. Steiner, as principals and Southern Operating Co. surety as sureties, are held and firmly bound unto W. P. Hays, County Court Clerk, and J. Parks Worley, State Revenue Agent of the State of Tennessee, in the penal sum of Five hundred (\$500.00) Dollars, to be paid to the obligees, their successors, representatives and assigns, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents:

136 Sealed with our seal and dated this 11th day of January A. D. 1913.

Whereas, the above named plaintiffs in error have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Tennessee;

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their writ of error to effect; and answer all costs and damages if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

PAUL HEYMAN,
By A. S. LITTLETON,
His Att'y at Law & in Fact.
W. H. STEINER,
By A. S. LITTLETON,
His Att'y at Law & in Fact.
SOUTHERN OPERATING CO.,
By LEE BLUM, *Sec'y.*

I hereby approve the foregoing bond and sureties, on this the 11th day of January A. D. 1913.

JNO. K. SHIELDS,
Chief Justice of the Supreme Court
of the State of Tennessee.

Citation.

THE UNITED STATES OF AMERICA, vs:

To W. P. Hays, County Court Clerk of Hamilton County, Tennessee, and J. Parks Worley, State Revenue Agent of the State of Tennessee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Tennessee, at Knoxville, Tenn., wherein the Southern Operating Company, Paul Heyman and H. W. Steiner, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error as in the said writ of error mentioned, should not be corrected and why substantial justice should not be done to the plaintiffs in error in that behalf.

Witness the Honorable John K. Shields, Chief Justice of the Supreme Court of the State of Tennessee, this 11th day of January in the year of our Lord, One Thousand Nine Hundred thirteen, and of the Independence of the United States, One Hundred Thirty-seventh.

JNO. K. SHIELDS,

*Chief Justice of the Supreme Court
of the State of Tennessee.*

Copy of the above citation received this — day of —, A. D. 191—, and service of the same accepted.

*Attorney General of the State of Tennessee,
and Attorney of Record for the Defendants
in Error in the Supreme Court of
the State of Tennessee.*

138 Know all men by these presents, That we, Southern Operating Company, principal, and — & —, as surety, are held and firmly bound unto W. P. Hays, J. Parks Worley and Sam A. Connor, in the penal sum of Five Hundred (\$500.00) Dollars, for which payment well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of January, in the Year of our Lord, One Thousand Nine Hundred Thirteen.

The condition of the above obligation is such that whereas, said principal obligor has, on the 9th day of January, 1913, prayed for and obtained from the Honorable Supreme Court of the State of Tennessee, holden at Knoxville, in the State of Tennessee, a writ of injunction returnable to said Supreme Court of Tennessee, holden at Knoxville, on the — day of —, 191—.

Now, if said principal obligor shall prosecute the said injunction

with effect, or in case it fails therein, shall well and truly pay and satisfy the said obligees, or either of them, all such costs and damages as may be awarded and recovered against the said obligor in any suit or suits which may hereafter be brought for wrongfully suing out said injunction; and shall, moreover, abide by and perform such decrees as the Court may make in this cause, and pay such costs and damages as the Court may order, then, the above obligation to be void, otherwise to remain in full force and effect.

SOUTHERN OPERATING CO.,

By LEE BLUM, *Sec'y.*

Attest:

— — —

— — —, *Principals.*

Witness:

C. B. PEARSON.

[Seal Maryland Casualty Company, Incorporated.]

MARYLAND CASUALTY COMPANY,

By ABE BROWN AND

J. B. MILLIGAN,

Attorneys in Fact, Surety.

Attest:

— — —

Witness:

C. B. PEARSON.

139

Citation.

THE UNITED STATES OF AMERICA, *ss:*

To W. P. Hays, County Court Clerk of Hamilton County, Tennessee, and J. Parks Worley, State Revenue Agent of the State of Tennessee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Tennessee, at Knoxville, Tenn., wherein the Southern Operating Company, Paul Heyman and H. W. Steiner, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error as in the said writ of error mentioned, should not be corrected and why substantial justice should not be done to the plaintiffs in error in that behalf.

Witness the Honorable John K. Shields, Chief Justice of the Supreme Court of the State of Tennessee, this 11th day of January in the year of our Lord, One Thousand Nine Hundred Thirteen, and of the Independence of the United States, One Hundred Thirty-eighth.

JNO. K. SHIELDS,

*Chief Justice of the Supreme Court
of the State of Tennessee.*

Copy of the above citation received this 6th day of February, A. D. 1913, and service of the same accepted.

CHARLES T. CATES, JR.,
*Attorney General of the State of Tennessee,
and Attorney of Record for the Defendants in Error in the Supreme Court of the State of Tennessee.*

Endorsed on cover: File No. 23,573. Tennessee Supreme Court. Term No. 475. Southern Operating Company, Paul Heyman and H. W. Steiner, plaintiffs in error, vs. W. P. Hays, County Clerk of Hamilton County, Tennessee, and J. Parks Worley, State Revenue Agent of the State of Tennessee. Filed March 3d, 1913. File No. 23,573.



FILED
DEC 9 1914
JAMES D. MAHER
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1914

No. ~~120~~ 121

PAUL HEYMAN and JULES HEYMAN, PART-
NERS, Doing Business Under the Firm Name
and Style of Paul Heyman, and the UNITED
STATES FIDELITY AND GUAR-
ANTY COMPANY, Plaintiffs
In Error.

vs.

W. P. HAYS, County Clerk of Hamilton County,
Tennessee; J. PARKS WORLEY, State Revenue
Agent of the State of Tennessee, and SAM A.
CONNER, Sheriff of Hamilton County,
Tennessee, Defendants in Error.

BRIEF ON BEHALF OF THE PLAINTIFFS IN
ERROR.

LITTLETON, LITTLETON & LITTLETON,
WILLIAMS & LANCASTER,
ALLISON, LYNCH & PHILLIPS,
Attorneys for Plaintiffs in Error.

INDEX

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
---	---	---	---	---	---	---	---	---	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	-----

INDEX

<i>Statement of the Case</i>	1-6
<i>Assignment of Errors</i>	6
<i>Brief and Argument</i>	8-24
<i>Revenue Act of Tennessee</i>	25-28

AUTHORITIES REFERRED TO.

<i>Adams Express Co. vs. Iowa</i> , 196 U. S., 133	12
<i>Addyston Pipe & Steel Co. vs. U. S.</i> , 175 U. S., 239	11
<i>American Steel & Wire Co. vs. Speed</i> , 102 U. S., 500	17
<i>Asher vs. Texas</i> , 128 U. S., 129	14
<i>Brennen vs. Tittersville</i> , 153 U. S., 289	14
<i>Cargill vs. Minnesota</i> , 180 U. S., 452	17
<i>Covington Bridge Co. vs. Kentucky</i> , 154 U. S., 205	14
<i>Crenshaw vs. Arkansas</i> , 227 U. S., 389	14
<i>Crutcher vs. Kentucky</i> , 141 U. S., 47	14
<i>Delamater vs. South Dakota</i> , 206 U. S., 97	19
<i>Dozier vs. Alabama</i> , 218 U. S., 123	20
<i>Ferry Co. vs. East St. Louis</i> , 107 U. S., 365	17
<i>Ficklen Taxing District</i> , 146 U. S., 1	17
<i>Galveston H. & S. A. R. Co. vs. Texas</i> , 210 U. S., 217	21
<i>General Oil Co. vs. Crane</i> , 209 U. S., 211	17
<i>Kelly vs. State</i> , 123 Tenn., 550	9
<i>Kidd vs. Pearson</i> , 128 U. S., 24	19
<i>Logan vs. Brown</i> , 125 Tenn., 209	16
<i>Moran vs. New Orleans</i> , 112 U. S., 69	14
<i>Nathan vs. Louisiana</i> , 8 Howard, 80	18
"Pipe Trust Case," 85 Federal, 271	15
<i>Richard vs. Mobile</i> , 208 U. S., 479	20
<i>Robins vs. Taxing District</i> , 120 U. S., 489	14
<i>State vs. Applegarth</i> , 28 L. R. A., 813	18
<i>Stockard vs. Morgan</i> , 105 Tenn., 412	15
<i>Stockard vs. Morgan</i> , 185 U. S., 30	14-15
<i>U. S. vs. Knight Co.</i> , 156 U. S., 11	10
<i>Vance vs. Vandercrook</i> , 170 U. S., 44	12



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1914.

No. 474.

PAUL HEYMAN and JULES HEYMAN, PART-
NERS, Doing Business Under the Firm Name
and Style of Paul Heyman, and the UNITED
STATES FIDELITY AND GUAR-
ANTY COMPANY, Plaintiffs

In Error,

vs.

W. P. HAYES, County Clerk of Hamilton County,
Tennessee; J. PARKS WORLEY, State Revenue
Agent of the State of Tennessee, and SAM A.
CONNER, Sheriff of Hamilton County,
Tennessee, Defendants in Error.

BRIEF ON BEHALF OF THE PLAINTIFFS IN
ERROR.

STATEMENT OF CASE.

May it Please the Court:

This case is here on writ of error to the Supreme Court of the State of Tennessee. The case involves the right of the State of Tennessee to levy a privi-

lege tax on the interstate sales of liquors made by the plaintiffs in error.

The original bill was filed in the Chancery Court at Chattanooga, by the plaintiffs in error against W. P. Hays, Clerk of the County Court, J. Parks Worley, Revenue Agent of the State of Tennessee, and Sam A. Connor, Sheriff of Hamilton County, Tennessee, alleging substantially the following facts:

(a) Complainants on January 1, 1912, were and since that time have continuously been engaged exclusively in interstate sales of liquor.

(b) That they lawfully owned and had in their possession a large stock of spirituous liquors.

(c) That on account of a recent enactment of the Legislature, regulating domestic traffic in intoxicating liquors, complainants have since the date mentioned abandoned all intrastate dealings in liquor, have not since that time sold or offered for sale, or handled for sale, any liquors to any person, firm or corporation in Tennessee, nor did they desire or intend to conduct any sort of intrastate trade in Tennessee.

(d) The manner in which complainants have conducted their business since January 1, 1912, and still conduct their business, is as follows and not otherwise:

"Complainants' said stock of liquors is kept in their warehouse at Chattanooga, Tennessee. Complainants solicit and receive orders by mail from citizens and residents of other states for shipment and delivery of said liquors into such other states, and complainants neither solicit orders in Tennessee, nor solicit orders for shipment and delivery at any points in Tennessee; nor do they make any such shipments or deliveries."

(e) When orders are received from non-residents, liquors are delivered to railroads engaged in interstate traffic, for delivery only to points beyond the State of Tennessee to non-resident purchasers.

(f) Complainants have complied with all the revenue laws of the United States and of the State of Tennessee, and they have paid the Federal taxes assessed against them as liquor dealers, and have paid the necessary Federal license.

(g) They have paid the State, County and City taxes on their stock of liquors and all their property and the ad valorem tax based upon their stock of goods commonly known as "Merchant's Tax."

(h) They have paid all privilege taxes prior to January 1, 1912.

(i) It was further alleged that defendants,

Worley as Revenue Agent, and Hayes as County Court Clerk, had assessed complainants with a privilege tax amounting to \$500.00 on the interstate business carried on by complainants, and had issued a distress warrant for said tax, and placed same in the hands of Sam A. Connor, Sheriff of Hamilton County, for collection, and in order to prevent a levy on their property, the complainants paid said illegal assessment, costs, penalties, etc., under protest.

(j) The said officials claimed this privilege tax was authorized by the Act of the General Assembly of the State of Tennessee, passed in 1909, Chapter 497.

Section IV of same provides, among other things, as follows:

"That such vocation, occupation and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the County Court Clerk as provided by law for the collection of Revenue."

Among the occupations enumerated is that of "Liquor Dealers."

"Liquor Dealers" are defined in the Act to be—

"Every person, company or firm selling spir-

ituous, vinous or malt liquors, beer or ale, or intoxicating bitters, or any medicated or adulterated cider, or any social club or association, incorporated or otherwise, which handles such liquors for sale."

(So much of said Act as is material is herewith appended.)

(k) It was alleged that this privilege tax was illegal as against complainants—(1) Because the Act was not intended to apply to those dealing in interstate commerce; and (2) because, if the Act did apply to interstate commerce transactions, then it was void because in conflict with the Commerce Clause of the Constitution of the United States.

(1) Complainants prayed for a recovery of the money paid to defendant Connor, under protest, this being one of the methods authorized by the law of Tennessee for the recovery of revenue illegally collected.

(Record, Pages 1-10.)

Defendants demurred to the bill.

(Record, Pages 11-12.)

The demurrer was overruled. Thereupon defendants refused to plead further or make other defense, and the bill was thereupon taken for confessed, and final decree rendered. The Chancellor sustained the

insistence made by the complainants, and granted the relief prayed for.

(Record, pp. 12 and 13.)

On appeal the case was reversed and plaintiffs' bill dismissed.

(Record, pp. 64 and 65.)

Both in their bill and in the brief filed by plaintiff in error to the Supreme Court of Tennessee, it was insisted that the privilege tax in question was a violation of the Commerce Clause of the Constitution of the United States.

It is not denied that this Federal question was properly raised.

On proper petition the case was brought to this Court by writ of error to the Supreme Court of Tennessee.

(Record, pp. 66 to 73.)

With said petition was filed the following—

ASSIGNMENT OF ERRORS.

I.

The Court erred in holding that Chapter 479 of the Acts of the General Assembly of the State of Tennessee, for 1909, and the laws of Hamilton County,

Tennessee, passed pursuant thereto, are, as applied to plaintiffs in error, and their business, and persons and businesses of a like class, valid, and not repugnant to, or in violation of Article One, Section 8, Sub-Section 3 of the Constitution of the United States.

II.

The Court erred in holding that the authority exercised and attempted to be exercised by the defendants in error, and their acts and threatened acts in the premises, under and by virtue of said Chapter 479 of the Acts of the General Assembly of the State of Tennessee, for 1909, and the laws of Hamilton County, Tennessee, passed pursuant thereto, in assessing, levying and collecting, and attempting to assess, levy and collect from said plaintiffs in error, Paul Heyman and Jules Heyman, as aforesaid, said State and County privilege tax, and the costs, fees, penalties, etc., thereto annexed, authorized and prescribed, were valid and not in violation of Article One, Section 8, Sub-section 3, of the Constitution of the United States.

III.

The Court erred in denying to plaintiff in error, Heymans, the rights, privileges and immunities claimed by them under said provisions of the Federal Constitution.

IV.

The Court erred in holding that plaintiffs in error,

Heymans, were not engaged exclusively in the occupation of carrying on interstate commerce; and that said tax upon their said occupation did not impose a burden upon interstate commerce within the meaning of said provision of the Federal Constitution.

V.

The Court erred in not affirming the decree of the Chancellor, and in denying the relief prayed.

VI.

The Court erred in: (a) reversing the decree of the Chancellor; (b) dissolving the injunction; (c) dismissing the bill; (d) sustaining the demurrers; (e) sustaining each of the assignments of error; (f) rendering judgment against plaintiffs in error, Heymans, and their surety, United States Fidelity & Guaranty Company, for the costs of the cause and awarding execution upon the same; (g) and in remanding so much of the cause to the Chancery Court of Hamilton County Tennessee, as was necessary to enable the defendants in error to take such proceedings as might be proper to collect from plaintiffs in error and their surety on the injunction bond, such damages as may have been sustained by the defendants in error incident to the alleged wrongful suing out of said injunction.

BRIEF AND ARGUMENT.

Plaintiffs in error had on hand a large stock of liquors in Chattanooga, Tennessee, and on account of

the anti-liquor law passed by the State, the intrastate sales of this liquor became unprofitable. The intrastate sale of said liquors could only be made for medicinal, chemical and manufacturing purposes, and it became unprofitable to conduct such a business. They, therefore, on January 1, 1912, began the sale of said liquors, to non-residents only.

The Supreme Court of Tennessee decided that the sale of these liquors to non-residents was not prohibited by the state statute, and that the statute would have been invalid if it had attempted to prohibit such sales.

Kelly vs. State, 15 Cates (123 Tenn.) 550.

These goods were lawfully on hand. Taxes had been paid upon same just as on any other property in the State, and it is not pretended that they were subject to any further tax while *at rest* in the warehouse. Exercising their rights under the constitution of the United States, plaintiffs in error began the sale and transportation of their goods to non-residents. Thereupon, and for this, the privilege taxes complained of were assessed and collected.

It is, therefore, too clear for argument that this tax was simply a tax upon the sale of said goods to non-residents. Indeed, the distinguished attorney general in his brief concedes that this is true. (Page 44 of his brief in cause 475) he says:

"By Section 991 the *right to sell* intoxicating

liquors is declared to be a taxable *privilege* in the sense of the 28th Section of Article 2 of the Constitution of Tennessee quoted."

After quoting from that part of the Act defining liquor dealers, (At Page 46 of his brief,) he says:

"It is submitted that this language but strengthens the idea that the right to engage in the business, occupation, or vocation of *selling intoxicating liquors* is, under the laws of Tennessee, created a privilege and, as such, taxed."

In so far as this tax applies to intrastate sales of liquors it is valid. But in so far as it applies to interstate sales we submit it is not valid.

Can the State of Tennessee tax the *interstate* sale of any commodity by simply calling same a privilege, and taxing it as such?

That the sale of goods kept on hand in one State to residents of other States, and the interstate shipment and delivery of same pursuant to such sale, is interstate commerce, would seem too clear for argument or cavil.

In the case of *U. S. vs. Knight Company*, 156 U. S., 11, the question of the power of the Federal Government under the Commerce clause of the Constitution was involved. Among other things, the court said:

"Contracts to buy, sell or exchange goods to be transported among the several States, the

transportation and its instrumentalities, and articles bought, sold or exchanged for the purpose of such transit among the States, or put in the way of transit, may be regulated, but this is because they form a part of interstate trade or commerce."

In the case of *Addyston Pipe & Steel Company vs. United States*, 175 U. S., 239, the Court, among other things, said :

"The direct and immediate result of the combination was, therefore, necessarily, a restraint upon interstate commerce in respect of any of the articles manufactured by any of the parties to it to be transported beyond the State in which they were made. The defendants, by reason of this combination and agreement, could only send their goods out of the State in which they were manufactured for sale and delivery in another State, upon the permission and pursuant to the provisions in said combination. As pertinently asked by the Court below, was this not a direct restraint upon interstate commerce in these goods?"

And again :

"A sale for transportation beyond the State makes the transaction a part of interstate commerce."

And gain :

"As has frequently been said, interstate commerce consists of intercourse and traffic between

the citizens and inhabitants of different States, and includes not only the transportation of persons and property in the navigation of public waters for that purpose, but *also the purchase, sale and exchange of commodities.*"

In the case of *Vance v. Vandervook*, 170 U. S., 44, the Court said:

"Equally well established is the proposition that the right to send liquor *from one State into another, and the act of sending the same*, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress; and hence that State law which denies such a right, or substantially interferes with or impairs the same, is in conflict with the Constitution of the United States."

And again:

"But the right of a person in one State to ship liquors into another State to a resident for his own use is derived from the Constitution of the United States and does not rest on the grant of State law."

In the case of *Adams Express Company v. Iowa*, 196 U. S., 133, Mr. Chief Justice White, said:

"Those cases rested upon the broad principle of the freedom of commerce between the States, and of the right of a citizen of one State to freely contract to receive merchandise from another State and of the equal right of the citizen of a State to contract to send merchandise into other States."

In the case of *West vs. Kansas Natural Gas Company*, 221 U. S., 229, this court held the statute of Oklahoma prohibiting the piping of gas out of the State, illegal as a violation of the Commerce clause of the Constitution.

Among other things, this court said:

"At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of the state, and that it cannot be regulated or restrained by a state, or that the State cannot exclude from its limits a corporation engaged in such commerce."

It is therefore clear that the plaintiffs in error were engaged alone in interstate commerce, and that the State of Tennessee has attempted to tax this commerce, as a privilege.

As stated by the court in the case just cited, the right to carry on interstate commerce, *is not the gift of a State.*

As stated in the *Vandervook* case, *supra*:

This right "is derived from the Constitution of the United States, and does not rest on the grant of State law."

If then, these plaintiffs in error had a right under the commerce clause of the Constitution of the United States to sell this property to citizens and residents

of other states, can the State of Tennessee tax the exercise of this right by calling same a "privilege"?

That a State cannot tax interstate commerce would appear to be too well settled for serious argument.

- Crenshaw vs. Arkansas, 227 U. S., 389.
- Stockard vs. Morgan, 185 U. S., 30.
- Brennen vs. Tittersville, 153 U. S., 289.
- Crutcher vs. Kentucky, 141 U. S., 47.
- Robins vs. Taxing District, 120 U. S., 489.
- Asher vs. Texas, 128 U. S., 129.
- Moran vs. New Orleans, 112 U. S., 69.
- Gloucester Ferry Company vs. Pennsylvania, 114 U. S., 204.
- Covington Bridge Company vs. Kentucky, 154 U. S., 205.

It is true there are a line of cases holding that instrumentalities of interstate commerce are subject to taxation and to some extent regulation by the State.

It is true that property intended for interstate commerce *at rest* in a State may be taxed by the State just as any other property within the state may be taxed.

It is true that the State in the exercise of its police power may prohibit the manufacture of goods, although the same may be intended for interstate commerce. It is also true that the State may pass quarantine and inspection laws with reference to property that is the subject of interstate commerce.

A discussion of the cases dealing with these various questions would be a useless consumption of the Court's time. The bald question we have in this case is whether the State can assess a *tax* on interstate commerce.

As said by Judge Taft in the "Pipe Trust Case," 85 Federal, 271:

"Contracts for sales of such articles to be delivered across State lines, and the negotiations and bids preliminary to the making of such contracts, all of which, as we have seen, do not merely affect interstate commerce, *but are interstate commerce.*"

We cannot escape the conclusion that the tax questioned in this case is a tax upon commerce itself.

The right of the State of Tennessee to tax interstate commerce under the guise of assessing a privilege on an occupation has been settled by this court.

In the case of *Stockard vs. Morgan*, 105 Tennessee, 412, it was decided that brokers in the City of Chattanooga, with established offices and places of business, who solicited orders from merchants in that city to various non-resident manufacturers and jobbers, and had goods shipped to these local merchants, were subject to a privilege tax.

It was insisted that this was a tax upon interstate commerce, to which the Supreme Court of Tennessee responded:

"We do not think so. The law does not discriminate. The tax is on the privilege of doing such business in the state without regard to the customers sought or principals represented. The thing taxed is the occupation of merchandise brokerage, not the business of those employing, whether they be domestic or foreign principals."

On appeal to this court the case was *reversed* in the case of *Stockard vs. Morgan*, 185 U. S., 27.

Among other things, Mr. Justice Peckham, speaking for the Court, said:

"It is in effect a tax upon interstate commerce, and that fact is not in anywise altered by calling the tax one upon the occupation of the individual residing within the state while acting as the agent of a non-resident principal. The tax remains one upon interstate commerce, under whatever name it may be designated."

And again:

"Although the State has general power to tax individuals and property within its jurisdiction, yet it has no power to tax interstate commerce even in the person of a resident of the State."

In the case at bar, the Supreme Court of Tennessee referred to the recent case of *Logan vs. Brown*, 125 Tenn., 209, as expressing the opinion of the Court on the question involved.

The Court in that case referred to the case of *Fick-*

len v. Taxing District, 146 U. S., 1, as authority for sustaining this tax.

In the *Ficklen* case the parties complaining had taken out a license to do a *general* commission business and had *paid* for that privilege. That case was distinguished in the *Stockard* case just referred to, and also in the case of *Brennen vs. Tittersville, supra*.

In the case of *Logan vs. Brown*, the Supreme Court also referred to the cases of *American Steel & Wire Company vs. Speed*, 102 U. S., 500, and *General Oil Company vs. Crane*, 209 U. S., 211.

These cases simply involve the right to tax property that had come *to rest* within the limits of the State.

The Court also referred to the case of *Ferry Company vs. East St. Louis*, 107 U. S., 365, and cases cited. It is manifest that these cases simply involved a tax on property as such, and not on commerce. Unquestionably the instrumentalities of commerce may be taxed.

The Court also referred to *Cargill vs. Minnesota*, 180 U. S., 452.

That case involved the validity of a tax upon an elevator business. While all the wheat sold by the company taxed was to persons outside the State, still the company did a general elevator and warehouse business, and the tax was upon such business.

Describing this business thus taxed, the Court said :

“Under these circumstances the warehouse is a sort of public market place, where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as marketmaster, weighmaster, inspector, and grader of the grain. Surely such a business is of a public character, and is sufficiently affected with a public interest to warrant a very considerable amount of regulation of it by the State.”

It is thus clear that none of the cases cited by the Court in the *Logan* case involved the right to tax interstate commerce. The reasoning of the Court in the *Logan* case was the same as in the *Stockard* case which was disapproved and reversed by this Court.

The distinguished Attorney General also refers to the case of *Nathan vs. Louisiana*, 8 Howard, 80. This case simply involves the validity of a tax on an exchange broker who dealt in foreign bills of exchange. It was insisted that his business was protected as interstate commerce, because “a tax upon the exchange broker is a tax upon the *instruments of commerce*.”

Of course, this was not a tax on interstate commerce, nor invalid as such.

The case of *State vs. Applegarth*, 28 L. R. A., 813, decided by the Supreme Court of Maryland is also referred to. It was simply held in that case that the

tax on the business of packing and canning oysters for sale and transportation was not a tax on interstate commerce. Manifestly, it was not. It is clear that the State may tax, regulate or prohibit the manufacture of any articles of trade or commerce, within the State. The fact that the manufacturer *intends* to use the same in interstate traffic does not interfere with the State's right to tax, but, after same has been manufactured, and is on hand as a part of the property of the owner, the State may not interfere with nor tax the *sale* of same to citizens of other States. The right to manufacture or produce the articles, or sell them in intrastate traffic, is a right derived from the State. The right to sell these articles to citizens and residents of other states is a right derived from the United States, and can neither be taxed nor interfered with by the State.

This distinction was clearly announced in the case of *Kidd vs. Pearson*, 128 U. S., 24, cited by adversary counsel.

The case of *Delamater vs. South Dakota*, 206 U. S., 97, is referred to by the Attorney General as applicable to this case. In that case it was simply held, by virtue of the Wilson Act, that the State of South Dakota had a right to tax the business of an agent soliciting orders within the State for liquors to be shipped into the State. This was because the Wilson Act had expressly conferred upon the State the power to regulate and control the sale of liquors

shipped into the State. Certainly, it was not intended by the Wilson Act to confer upon the State the power to tax interstate commerce in liquors to be shipped *out* of the State. On the contrary, the power was confined to the right of the State to regulate the sale of liquors *within* the State after same should be shipped into the State from another State. The same principle is announced in the case of *Richard vs. Mobile*, 208 U. S., 479, cited in adversary counsel's brief.

In no case has it been held that interstate commerce as such may be taxed by the State.

Adversary counsel seek to distinguish the case of *Stockard vs. Morgan* and other cases, on the ground that in these cases, the agent or broker making the sale was within the State and made such sales as agent for principals, who were without the State at the time. Manifestly, no such distinction was in the mind of the Court in deciding these cases. In the *Stockard* case, the tax sought to be assessed was against the resident brokers on the business transacted by them, and the Court said that the State has no power "to tax interstate commerce even in the person of a resident of the State."

The facts of cases differ of course—but in all the cases in this Court when the facts have shown an attempt to tax interstate commerce the tax has been held invalid.

In the case of *Dozier vs. Alabama*, 218 U. S., 123,

the plaintiff in error was convicted and sentenced to pay a fine because he did business without paying a license tax required by the State of Alabama. In that case, it appeared that the orders for the pictures and frames were received by the agent within the State and sent to him from the principal without the State, with the option given to the purchaser to take or decline the frames when same should be presented by the agent. It was therefore, held by the Supreme Court of Alabama that this was an *intra*-state and not an *inter*-state transaction, and hence the tax was valid. The case was reversed by this Court:

Mr. Justice Holmes, speaking for the Court, said:

"No doubt it is true that the customer was not bound to take the frame unless he saw fit, and that the sale of it took place wholly within the State of Alabama, if a sale was made. But, as was hinted in *Rearick vs. Pennsylvania*, 203 U. S., 507, 512; 51 L. Ed., 295, 297; 27 Sup. Ct. Rep., 159, what is commerce among the States is a question depending upon broader considerations than the existence of a technically binding contract or the time and place where the title passed."

This is a complete answer to the insistence that because the sales were made within the State the same were therefore taxable by the State.

In the case of *Galveston, H. & S. A. R. Co. vs. Texas*, 210 U. S., 217, the validity of a tax on the in-

come from railroads whose lines were *wholly within the State*, was involved. The Court said :

“The lines of the railroad concerned are wholly the State, but they connect with other lines, and a part, in some instances much the larger part, of their gross receipts is derived from the carriage of passengers and freight coming from, or destined to, points without the State.”

This Court held the tax a violation of the commerce clause of the Constitution, because it was a tax upon interstate commerce. The Court very clearly pointed out the difference between the taxation of *property* and the taxation of *commerce*.

Mr. Justice Holmes speaking for the Court said :

“Neither the State Courts nor the Legislatures by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be save dby name or form.”

The concluding clause of Section 16 of the Tennessee Act in question reads as follows :

“But this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce.”

Section 16 provides that it shall be a misdemeanor

to exercise any of the privileges provided for in the Act without having paid the required tax. The distinguished Attorney General says in his brief at Page 46:

"It is evident that this last quoted language applies alone to the inhibition of said Section 16 and more particularly that it applies alone to the fine imposed therein. It is perfectly apparent that the legislature was of the opinion that the imposition of a fine upon one engaged in interstate commerce would be a burden upon such interstate commerce within the rules laid down by this Court. This Section 16, and particularly this last line and a half, was incorporated in this act, not because the privilege tax provided for liquor dealers did not, under it, apply to those engaged in interstate sales, but because the legislature was of the opinion that the imposition of a fine for the violation of the act by an interstate dealer would render the whole act obnoxious to the commerce clause of the Constitution under the rules announced by this Court."

In other words, it is insisted that this Act was passed for the purpose of *taxing* interstate commerce, but that the Legislature was afraid that it would render the Act obnoxious to the commerce clause of the constitution to provide a *punishment* for the failure to pay the tax for the privilege of doing an interstate commerce business.

But it is clear that the State may no more tax interstate commerce than it can punish a citizen for a failure to pay the tax.

The only question is whether this is a tax on interstate commerce. Confessedly it is and hence it is invalid.

Respectfully submitted,

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"CHAPTER 479.**"AN ACT TO PROVIDE REVENUE FOR THE
STATE OF TENNESSEE AND THE COUNTIES
AND MUNICIPALITIES THEREOF.**

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, That the taxes on every \$100 worth of property shall be 50 cents for the year 1909, and for every subsequent year thereafter, 35 cents of which shall be for state purposes and 15 cents for school purposes; that there shall be levied and collected a collateral inheritance tax as provided for in Chapter 174 of the acts of 1893 and acts amendatory thereof.

"Section 2. Be it further enacted, That the several county courts of this State be, and they are hereby, authorized and empowered to levy an annual county tax on every \$100 worth of taxable property not exceeding 30 cents upon the \$100 worth of property, and exclusive of the tax for public roads and pikes and schools and interest on county debts and other special purposes; and each county and municipality in this State is hereby authorized and empowered to levy a privilege tax upon merchants and such other vocations, occupations, or businesses as are named in this act and declared to be privileges, not exceeding in amount that levied by the State for State purposes. The imposition of a privilege tax under this act shall not be construed as a release or

exemption from an ad valorem tax unless otherwise expressly provided; nor shall this act be construed as repealing any special act heretofore passed imposing a privilege tax: Provided, That any indigent ex-Confederate or ex-Federal soldier doing a privilege business, with a capital not exceeding \$250, shall be exempt from paying the privilege tax herein provided for.

"Section 3. Be it further enacted, That all merchants shall pay an ad valorem tax upon the average capital invested by them in their business of 50 cents on the \$100, 35 cents of which shall be for State purposes and 15 cents for school purposes; and a privilege tax of 15 cents on each \$100 worth of taxable property, 7½ cents of which shall be for school purposes and 7½ cents for State purposes: Provided, That such privilege tax, without regard to the length of time they do business, shall in no case be less than \$5. The \$5 paid shall be a credit when the balance of the tax is paid: Provided, further, That said \$5 shall be equally divided between the State and counties: Provided, further, That when the stock is less than \$800, the privilege shall be fixed at \$7.50 per annum, and that no ad valorem shall be taxed.

"Section 4. Be it further enacted, That each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid

to the county court clerk as provided by law for the collection of revenue.

"LIQUOR DEALERS.

"Wholesale, and, in addition, taxed as other merchants\$500.00

"Detail, taxed as other merchants, and, in addition, shall pay as follows:

"In cities, taxing districts, or towns of 6,000 inhabitants or over, each per annum 500.00

"At any place, city, taxing district, or town of less than 6,000 inhabitants, each, per annum 500.00

"Persons selling beer or any quantity of liquors on steamboats, flatboats, or any other vessel or water craft or from railroad cars, shall pay a tax, each, in lieu of all other taxes to be paid in any county they may elect, per annum 500.00

"Persons selling liquors in quantities of one quart or more, except manufacturers selling to dealers in original packages of not less than five gallons, are wholesale dealers, and persons selling smaller quantities than five gallons are retail dealers; and the tax on liquor dealers applies to all drug stores, except in uses of wine for sacramental purposes and alcohol for domestic purposes. No producer of grape wine, where they raise and make the wine themselves, shall pay any privilege tax for selling the same.

"Provided, They shall not sell in quantities of less than one and a half ($1\frac{1}{2}$) gallons.

"Liquor dealers are defined as every person, company, or firm selling spirituous, vinous, or malt liquors, beer or ale, or intoxicating bitters, or any medicated or adulterated cider, or any social club or association, incorporated or otherwise, which handles such liquors for sale. The procuring of United States revenue license to wholesale or retail liquor dealers shall be taken as prima facie evidence that the parties are in the wholesale or retail liquor business, and are subject to State and county taxes, unless established by proof that they are not so engaged. Upon any clerk's receiving knowledge of such internal revenue license, he shall have a right to collect the taxes by distress warrants.

"Provided, That nothing in this act shall authorize or legalize the sale of liquors."

.

"Section 16. Be it further enacted, That it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the taxes prescribed for the exercise of the same, and all parties so offending shall be liable to a fine of not less than \$10 nor more than \$50 for each day such privilege is exercised without license; but this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce."

Office Supreme Court, U.S.

FILED

NOV 20 1914

JAMES D. MAHER

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1914.

No. 121.

PAUL HEYMAN AND JULES HEYMAN, PARTNERS,
DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF
PAUL HEYMAN, AND THE UNITED STATES FIDEL-
ITY AND GUARANTY COMPANY, PLAINTIFFS IN
ERROR,

vs.

W. P. HAYES, COUNTY CLERK OF HAMILTON COUNTY,
TENNESSEE; J. PARKS WORLEY, STATE REVENUE
AGENT OF THE STATE OF TENNESSEE, AND SAM A. CON-
NOR, SHERIFF OF HAMILTON COUNTY, TENNESSEE,
DEFENDANTS IN ERROR.

**BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR,
W. P. HAYES, CLERK; J. PARKS WORLEY, STATE
REVENUE AGENT, AND SAM A. CONNOR, SHERIFF.**

FRANK M. THOMPSON,
Attorney General for Tennessee.



TOPICAL INDEX.

	Page.
1. General statement of case.....	1
(a) Chapter 479 of Acts of General Assembly for 1909 assailed as repugnant to commerce clause of Fed- eral Constitution	2
2. Pleading	5
(a) Averments of original bill.....	5
(b) Demurrer	10
3. Disposition of case by chancellor.....	10
(a) Demurrer overruled	10
(b) Chapter 479 held violative of commerce clause of Fed- eral Constitution	11
(c) Appeal prayed, granted, and perfected to State su- preme court	11
4. Trial and disposition of case in State supreme court.....	11
(a) Assignments of error by attorney general for defend- ants	11
(b) Opinion of State supreme court.....	12
(c) Decree of said supreme court.....	13
(d) Petition for writ of error.....	14
(e) Assignment of error in support of said petition.....	14
(f) Writ of error granted.....	14
(g) General concluding statement.....	14
5. Other constitutional provisions and statutes to be construed <i>in pari materia</i> with said chapter 479.....	15
(a) Constitution of Tennessee, art. 1, sec. 28.....	15
(b) Code provisions rendering the business of liquor deal- ers a privilege.....	16
(c) Four-mile law and construction thereof by State su- preme court	18
(d) Manufacturers' bill and construction thereof by su- preme court	20
(e) Construction of said chapter 479, acts of 1909, by State supreme court	21
6. Conclusion	23

INDEX OF CASES CITED.

Austin vs. Shelton, 122 Tenn., 637.....	21
Kelly vs. Dwyer, 75 Tenn., 180.....	17
Kelly vs. State, 123 Tenn., 550.....	19
Logan vs. Brown, 125 Tenn., 209.....	21
Motlow vs. State, 125 Tenn., 548.....	20
State vs. Butler, 1 Shannon's Cases, 91.....	17
State vs. Kelly, 125 Tenn., 563.....	19



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REVENUE AGENT, AND SAM A. CONNOR, SHERIFF,
BY FRANK M. THOMPSON, ATTORNEY GENERAL
OF TENNESSEE.

I.

Statement of the Case.

May it please the Court: This is a writ of error to the
Supreme Court of the State of Tennessee awarded by the
Chief Justice thereof, upon the ground that the judgment

in the case affirmed and sustained the validity of chapter 479 of the Acts of the General Assembly of said State, known as the general revenue bill, which said statute the plaintiffs in error asserted and claimed to be in conflict with article 1, section 8, subsection 3, of the Constitution of the United States, which is as follows:

“Congress shall have the power to regulate commerce with foreign nations, among the several States and among the Indian tribes.”

The case arose upon a bill filed by the plaintiffs in error against the defendants in error as clerk of the county court of Hamilton County, Tennessee; State revenue agent of the State of Tennessee, and sheriff of Hamilton County, Tennessee, in the chancery court at Chattanooga for Hamilton County, Tennessee, on the 12th day of June, 1912.

Said chapter 479, assailed as being violative of said commerce clause of the Federal Constitution, is to be found in the sheet acts of the Legislature of Tennessee for said year 1909, and so much of the same as is material to the issues involved, is as follows:

“CHAPTER 479.

“AN ACT TO PROVIDE REVENUE FOR THE STATE OF
TENNESSEE AND THE COUNTIES AND MUNICIPALITIES
THEREOF.

“SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the taxes on every \$100 worth of property shall be 50 cents for the year 1909, and for every subsequent year thereafter, 35 cents of which shall be for State purposes and 15 cents for school purposes; that there shall be levied and collected a collateral inheritance tax as provided for in chapter 174 of the acts of 1893 and acts amendatory thereof.

“SECTION 2. *Be it further enacted*, That the several county courts of this State be, and they are hereby, authorized and empowered to levy an annual

county tax on every \$100 worth of taxable property not exceeding 30 cents upon the \$100 worth of property, and exclusive of the tax for public roads and pikes and schools and interest on county debts and other special purposes: and each county and municipality in this State is hereby authorized and empowered to levy a privilege tax upon merchants and such other vocations, occupations, or businesses as are named in this act and declared to be privileges, not exceeding in amount that levied by the State for State purposes. The imposition of a privilege tax under this act shall not be construed as a release or exemption from an ad valorem tax unless otherwise expressly provided; nor shall this act be construed as repealing any special act heretofore passed imposing a privilege tax; *Provided*, That any indigent ex-Confederate or ex-Federal soldier doing a privilege business, with a capital not exceeding \$250, shall be exempt from paying the privilege tax herein provided for.

"SECTION 3. *Be it further enacted*, That all merchants shall pay an ad valorem tax upon the average capital invested by them in their business of 50 cents on the \$100, 35 cents of which shall be for State purposes and 15 cents for school purposes; and a privilege tax of 15 cents on each \$100 worth of taxable property, 7½ cents of which shall be for school purposes and 7½ cents for State purposes: *Provided*, That such privilege tax, without regard to the length of time they do business, shall in no case be less than \$5. The \$5 paid shall be a credit when the balance of the tax is paid: *Provided, further*, That said \$5 shall be equally divided between the State and counties: *Provided, further*, That when the stock is less than \$800, the privilege shall be fixed at \$7.50 per annum, and that no ad valorem shall be taxed.

"SECTION 4. *Be it further enacted*, That each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the county court clerk as provided by law for the collection of revenue.

"Liquor Dealers.

"Wholesale, and, in addition, taxed as other merchants	\$500.00
"Retail, taxed as other merchants, and, in addition, shall pay as follows:	
"In cities, taxing districts, or towns of 6,000 inhabitants or over, each, per annum....	500.00
"At any place, city, taxing district, or town of less than 6,000 inhabitants, each, per annum	500.00
"Persons selling beer or any quantity of liquors on steamboats, flatboats, or any other vessel or water craft or from railroad cars, shall pay a tax, each, in lieu of all other taxes to be paid in any county they may elect per annum.....	500.00

"Persons selling liquors in quantities of one quart or more, except manufacturers selling to dealers in original packages of not less than five gallons, are wholesale dealers, and persons selling smaller quantities than five gallons are retail dealers; and the tax on liquor dealers applies to all drug stores, except in uses of wine for sacramental purposes and alcohol for domestic purposes. No producer of grape wine, where they raise and make the wine themselves, shall pay any privilege tax for selling the same.

"*Provided*, They shall not sell in quantities of less than one and a half (1½) gallons.

"Liquor dealers are defined as every person, company, or firm selling spiritous, vinous, or malt liquors, beer or ale, or intoxicating bitters, or any medicated or adulterated cider, or any social club or association, incorporated or otherwise, which handles such liquors for sale. The procuring of United States revenue license to wholesale or retail liquor dealers shall be taken as prima facie evidence that the parties are in the wholesale or retail liquor business, and are subject to State and county taxes, unless established by proof that they are not so engaged. Upon any clerk's receiving knowledge of such internal-revenue license, he shall have a right to collect the taxes by distress warrants.

"Provided, That nothing in this act shall authorize or legalize the sale of liquors."

* * * * *

"SECTION 16. Be it further enacted, That it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the taxes prescribed for the exercise of the same, and all parties so offending shall be liable to a fine of not less than \$10 nor more than \$50 for each day such privilege is exercised without license; but this inhibition shall not apply to any person, firm, or corporation engaged in interstate commerce."

Pleadings.

The said bill contained the following averments.

That on January 1, 1912, plaintiffs in error were and since continually have been and still are engaged in interstate business exclusively as follows: that at said date they lawfully owned and had in their possession a large stock of spiritous liquors. The laws of the State of Tennessee recently enacted regulating domestic traffic in intoxicating liquors are such that plaintiffs in error cannot profitably conduct that character of business. For this reason plaintiffs in error have since the 1st day of January confined, and still confine, their operations exclusively to the sale of said liquors to non-residents of the State of Tennessee for shipment out of and beyond the limits of the State of Tennessee and into other States for delivery there, and have not since said date sold or offered for sale or handled for sale, nor do they desire or intend to sell or offer for sale, any liquors for any purpose within the State of Tennessee. The manner in which the plaintiffs in error have conducted their business since January 1, 1912, and still conduct their business is as follows, and not otherwise: Plaintiffs in error's said stock of liquors is kept in their warehouse at Chattanooga, Tennessee. Plaintiffs in error solicit and receive orders by mail from citizens and residents of other States for

shipment and delivery in such other States of said liquors, and plaintiffs in error neither solicit orders in Tennessee nor solicit nor receive orders for shipments and delivery to any points in Tennessee, nor make any such shipments or deliveries. Upon receiving orders from citizens and residents of other States for the shipment of liquors from the State of Tennessee into such other and different States and delivery there, they manifest their acceptance of such orders by delivery of said liquors from their said place of business at Chattanooga, Tennessee, to railroads engaged in interstate traffic for continuous transportation and delivery only to points beyond the State of Tennessee and to said purchasers; which said act of delivery closes said contract of sale; and they collect the price of the goods sold by checks and money orders mailed to them from said foreign States, either at the time the order is received or after said liquors are received by said purchasers.

Tr., pp. 2-3.

That they have complied with all the revenue laws of the United States and of the State of Tennessee applicable to them. They have paid the Federal taxes assessed against them as liquor dealers and hold Federal license to carry on business as such. They have paid the State, county, and city taxes upon their property and the ad valorem tax based upon the value of their stock of goods, commonly known as "merchants' tax," and they are advised, believe, and charge they are subject to no further assessment for taxation. They have paid all privilege taxes claimed by defendants, including the privilege taxes provided for in chapter 479, acts of 1909, up till the said first day of January, 1912.

Tr., p. 3 .

A portion of said chapter 479 is then set out in the bill.

Tr., pp. 3-4.

It is then averred that said chapter 479, relating to privilege taxes, has no application to the plaintiffs in error

and that they are not subject to its provisions; that the clear intent, meaning, and purpose of the statute is to prescribe a privilege tax against all persons, firms, and corporations engaged in selling spirituous liquors within the State of Tennessee and not against those exclusively in interstate commerce business; that they are further advised that if said statute is susceptible to the construction that it imposes a privilege tax upon all persons, firms, and corporations engaged, like plaintiffs in error, in interstate commerce exclusively that the same to that extent is violative of article 1, section 8, subsection 3, of the Constitution of the United States.

It is further averred that the said Worley and Hayes had conceived the idea that although the plaintiffs in error are engaged exclusively in interstate commerce that they be assessed with said county and State privilege tax for the year 1912 and subjected to payment thereof; that said Worley and Hayes had the right to assess plaintiffs in error; that they proceeded under color of said act of 1909, chapter 479, but without warrant and authority of law and in violation of article 1, section 8, subsection 3, of the Constitution of the United States, *ex parte*, and without giving them an opportunity to be heard, have illegally attempted to assess plaintiffs in error with said State privilege tax for the year 1912, beginning January 1, amounting to \$500.00, together with costs, penalties, etc., provided by said statute to be paid by persons engaged in domestic traffic in spiritous liquors, and have likewise illegally attempted to assess plaintiffs in error with the privilege tax provided by and for the county to be paid by persons engaged in domestic traffic in spiritous liquors in a like sum and with like penalties; that said Hayes thereupon, *ex parte*, and without giving plaintiffs in error an opportunity to be heard, illegally and in violation of said article 1, section 8, subsection 3, of the Federal Constitution, issued a distress warrant against the plaintiffs in error, calling upon its face for twice the sum of said State tax, together with costs, penalties, fees, etc., and placed the same in the

hands of said defendant in error, Sam A. Connor, sheriff of Hamilton County, Tennessee, for execution and collection.
Tr., p. 5.

That said defendant in error, Sam A. Connor, as such sheriff, having said void and illegal warrant authorizing the seizure of their property for the satisfaction of said amount of said taxes, penalties, fees, etc., came to their place of business and threatened to levy said distress warrant upon their stock of goods and wares, and was about to immediately seize and sell their property; that a seizure of their property being imminent, and there being no other legal means of protecting the same as to the tax claimed for the State than by payment of said sum illegally claimed for said privilege tax, costs, penalties, etc., and to save their property from levy, seizure, and sale, and under duress of process, that they paid over to said Connor, sheriff, the sum of \$500.00, together with the penalty of \$75.00; sheriff's fees, \$15.00; costs on distress warrant, \$2.25, and clerk's fee, \$1.50, totaling \$593.75; that said Connor at said time executed a receipt for said tax, costs, etc., which is made a part of the bill as Exhibit "A."

It is further charged that said plaintiffs in error are in no way liable for said sum and are not subject to said privilege taxes for the reasons therein stated, and that they are entitled to sue to recover back the said sum so paid.

Tr., pp. 5-6.

That despite the fact that plaintiffs in error had paid under protest the privilege tax claimed by defendants in error for the State that said Connor, at the instance of said Worley and Hayes, was then at the plaintiffs in error's place of business in Chattanooga with a void and illegal distress warrant in his hands, and was about to immediately distrain, seize, and sell plaintiffs in error's property for the privilege tax claimed for Hamilton County of \$500.00, together with penalties, costs, etc., amounting in all to \$593.75, and that

unless restrained the said Connor would immediately, under such process, seize and sell said property, and that such seizure and sale would irreparably injure the said plaintiffs in error.

It is further charged that unless the defendants in error were enjoined that they would, by litigation in other courts and the use of other methods, attempt to enforce and collect the illegal and unauthorized taxes, and that all matters with reference to said taxes should be litigated and decided in this suit and to prevent a multiplicity of suits; that, therefore, the defendants, and each of them, should be enjoined from further attempting to collect said illegal taxes except in this court and in this cause; that plaintiffs in error have not a full, adequate and complete remedy at law.

Tr., pp. 6-7.

It is further charged that plaintiffs in error are in no ways subject to said privilege tax and that the acts of the defendants in error are void and illegal, and that the same are a misuse and abuse of the offices of the defendants in error, and that they will work a deprivation of plaintiffs in error's rights as citizens under the laws of the State of Tennessee and of the United States.

Tr., p. 7.

The bill prays for process, for an injunction restraining Connor from further proceeding to execute said distress warrant, and restraining the defendants in error and each of them from collecting said county privilege tax. That it be adjudged and decreed that the laws of Tennessee do not impose a tax upon the privilege of engaging in interstate business as a dealer in spiritous liquors, and that plaintiffs in error are engaged in such business and not subject to said tax; or, if the court should believe that said act does impose said tax upon interstate liquor dealers, that said statute and county laws pursuant thereto be declared to that extent vio-

lative of the said commerce clause of the Constitution. It is further prayed that they have a judgment for the said \$593.75 paid under protest and also for general relief.

Tr., p. 7.

Demurrer.

On July 22, 1912, the defendants in error filed a demurrer setting forth three grounds therein: First. To so much of the bill as seeks to enjoin the collection of the county tax, upon the ground that the plaintiffs in error are engaged in the interstate business; that is, selling only to parties outside of the State, for the reason that the privilege tax referred to is imposed by law upon the plaintiffs in error under the facts set out in the bill, and its imposition is not a burden on commerce between the States nor in conflict with the Federal Constitution. Second. To so much of the bill as seeks an injunction upon the ground that the imposition of said tax would destroy the business of the plaintiffs in error, because of the size of the tax as compared with the size of the business, because that is wholly immaterial. Third. To so much of the bill as seeks the recovery of the said sum of \$593.75 paid to the said Connor under protest for said State privilege tax for the year 1912, because the bill shows on its face that plaintiffs in error were liable for said tax, and the imposition of the same was not a burden upon commerce between the States or in conflict with the Federal Constitution.

Final Decree of the Chancery Court.

On July 22, 1912, the case was heard upon said demurrer along with the cause of the Southern Operating Co. *et al.* vs. W. P. Hayes *et al.*, which is No. 122 on the docket of this court, and the court was of the opinion that neither of said grounds of said demurrer were well taken and, therefore, overruled all of the same. Thereupon the said defendants

in error refused to plead, answer or make further defense to said bill, electing to rely upon their said demurrer so overruled; thereupon said bills were ordered to be taken for confessed and the cause was then heard upon the whole record, and it was adjudged that the plaintiffs in error were entitled to the relief sought; that the injunction heretofore granted restraining the said Connor from proceeding to execute said distress warrant be made perpetual, and also restraining the other defendants in error from proceeding to collect said tax except in said cause.

The court then found that said statute properly construed does not impose a tax upon the privilege of engaging in interstate business as a dealer in spiritous liquors, and that plaintiffs in error were at the time of the filing of the bill and are now exclusively engaged in such business, and therefore not subject to said tax. The court further found that if the act was construed so as to make it apply to the business of an interstate liquor dealer that the same was to that extent violative of the said commerce clause of the Constitution. A judgment was then awarded against the said defendant in error Connor, as sheriff, for the said sum of \$593.75 for said State tax, with penalties, costs, fees, etc. The defendants in error excepted to all of said decree, prayed, obtained and perfected an appeal to the Supreme Court of Tennessee, which is the court of last resort in Tennessee.

Tr., pp. 12-13.

Issues, Trial, and Disposition of the Case in the State Supreme Court.

At the September term, 1912, the then attorney general of the State of Tennessee, Chas. T. Cates, Jr., filed four assignments of error to the said decree of the said chancellor, heretofore set out, which assignments of error are as follows:

(1) Upon the facts stated in the bill showing that the plaintiffs in error were liquor dealers in the city of Chatta-

nooga, Tennessee, where they had their place of business, their stock of liquors and all paraphernalia necessary to carry on said business, and where they were engaged in carrying on the business or occupation of a liquor dealer, the chancellor erred in holding, first, that the act of 1909, chapter 479, in so far as it imposed a tax upon liquor dealers, does not apply to the occupation and business so carried on by plaintiffs in error; and, second, that said act, if construed to apply to the business as described in the bill, is in contravention of the commerce clause of the Federal Constitution, and therefore void.

(2) Upon the facts stated in the bill the chancellor erred in rendering a decree in favor of the plaintiffs in error for the amount of the State tax, penalties, etc., paid by them under protest, because upon their own showing the plaintiffs in error were and are liable for said tax.

(3) Upon the facts stated in the bill the chancellor erred in rendering a decree enjoining the enforcement of the distress warrant as to the county privilege tax, penalties, etc., because upon the showing made by plaintiffs in error in their bill they are liable to the county of Hamilton for said privilege tax as liquor dealers—that is, personally engaged in the business and occupation of liquor dealers in Hamilton County, Tennessee.

(4) The chancellor erred in not dismissing the bill at the cost of plaintiffs in error.

Tr., pp. 18-19.

Opinion of the Supreme Court.

On November 2, 1912, the Supreme Court, through Neil, one of the justices thereof, handed down an opinion stating that the cause was filed for the purpose of collecting from said sheriff the said sum of \$593.75 and to restrain the other defendants in error from collecting the said privilege tax for Hamilton County. That said bill was met by a demurrer which was overruled by the chancellor. That defendants in

error refused to further plead, and that thereupon the injunction was made perpetual, whereupon an appeal was taken to this court. The opinion continues:

"The substance of the bill is that the plaintiffs in error are wholesale liquor dealers in the city of Chattanooga; that they have taken out a Federal license, but that they sell only to persons living in other States, on orders received from them and filled by delivering their goods to a common carrier engaged in interstate business; that they have not sold goods within the State, and will not sell within the State.

"But it appears, also, from the bill, not in express terms but by clear inference from other matters stated, that the plaintiffs in error have a regularly organized business—a business house and employees, etc.,—and that they are conducting the business within the State of Tennessee, although they sell all their goods beyond the State.

"We are of the opinion that the case falls directly within *Logan vs. Brown*, decided by this court last year and reported in 141 S. W., 751, and 125 Tenn., 211, and the Federal cases therein referred to and relied on, and that there is no substantial distinction between that case and the present one.

"It results that the decree of the chancellor must be reversed and the suit of plaintiffs in error dismissed with costs."

Tr., pp. 64-65.

The decree of the court entered upon the minutes, after reciting that the case fell within the rule of *Logan vs. Brown*, then continues:

"The court being further of the opinion that the demurrer interposed by defendants in error in the lower court was well founded, it is therefore ordered, adjudged and decreed that the same be and is hereby sustained, plaintiffs in error's bill is hereby dismissed, except in so far as it may be necessary to retain the same in order to collect the amount of privilege taxes due the county of Hamilton and State of Tennessee, from plaintiffs in error, carrying on the business and

occupation of liquor dealers in Hamilton County, Tennessee, and for this purpose this cause is remanded to the chancery court of Hamilton County in order that there may be a reference to ascertain the amount of damages suffered under the injunction issued in this cause, and for proper proceedings against plaintiffs in error, and their sureties on the injunction bond, in order to collect the amount of said privilege taxes, with interest, etc., due thereon. It is further decreed that the injunction issued in this case be and the same is hereby in all things dissolved."

The decree further provides that the said Connor, as sheriff, pay over all of the said sum of \$593.75, except his fee, to the clerk of the county court, under said act.

Tr., pp. 63-64.

Petition for Writ of Error.

Thereupon the plaintiffs in error filed their petition for writ of error, which is to be found in the record at pages 66, 67, 68, and 69. On the 11th day of January, 1913, the chief justice of said court, John K. Shields, signed the following order:

"It is ordered that a writ of error be, and is hereby allowed to this court from the Supreme Court of the United States; and upon petitioner executing good and solvent bond in the penal sum of \$500.00, conditioned as required by law, said writ of error and bond shall operate as a supersedeas."

It was stated that this order was made to give to the said petitioners an opportunity to present to this court the questions contained in the record.

Tr., pp. 70-71.

The foregoing constitutes a somewhat extended statement of the facts, issues, and legal questions presented by this record, and out of the same two questions arise: (1)

Whether said chapter 479, hereinbefore quoted, applies alone to domestic liquor dealers or dealers selling alone to parties within the State of Tennessee, or whether it applies to all liquor dealers whether engaged in intra or interstate sales; (2) if applicable to liquor dealers engaged in both intra and interstate sales, or to liquor dealers whose purpose is to sell only in interstate commerce, as claimed and contended and set up by plaintiffs in error, then is the same in conflict with and violative of the said commerce clause of the Federal Constitution?

II.

Other Constitutional Provisions and Statutes which are to be Considered in *Pari Materia* with said Chapter 479, Acts of 1900.

CONSTITUTION OF TENNESSEE.

Art. 1, section 28 of the Constitution of Tennessee is as follows:

"All property, real, personal or mixed, shall be taxed, but the Legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall except one thousand dollars' worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer, and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such a manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value, but the Legislature shall have the power to tax merchants, peddlers and privileges, in such manner as they may from time to time direct. The por-

tion of a merchant's capital used in the purchase of merchandise sold by him to non-residents and sent beyond the State, shall not be taxed at a rate higher than the *ad valorem* tax on property. The Legislature shall have power to levy a tax upon incomes derived from stocks and bonds that are not taxed *ad valorem*. All male citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State."

Statutes.

Section 991 of Shannon's Code provides:

"The right to sell spiritous, vinous, or fermented liquors is a taxable privilege in the sense of the twenty-eighth section of the second article of the Constitution."

Section 992 provides:

"This privilege shall not be exercised by any person without license from the clerk of the county court."

Section 993 provides:

"The license may be granted to a person competent to take the same, upon the following condition: (1) That the applicant deliver to the clerk a sworn statement of the value of the liquors about to be offered for sale at the establishment for which he demands a license."

Section 994 says:

"It shall not be lawful for any person or persons to sell, or offer to sell, any spiritous or alcoholic liquors within this State, until he, she, or they, shall first appear before the county court clerk of the county where such liquors are to be sold or offered for

sale, and take and subscribe to an oath not to mix or adulterate with any substance whatever, the liquors offered for sale, and to give bond in the sum of Five Hundred Dollars, with good and sufficient security, for the payment of all costs arising from prosecution for violation of provisions herein."

The foregoing acts were passed in 1859-60 and 1881, and are not repealed by said chapter 479, because the same expressly provides against their repeal on its face.

In construing this constitutional provision and these acts, the Supreme Court of Tennessee has held that the merchants' tax mentioned in said constitutional provision is entirely distinct and separate from the privilege tax mentioned therein and provided for as to liquor dealers under said section 991 of the Code.

Kelly vs. Dwyer, 75 Tenn., 180.

In dealing with said constitutional provision and these statutes, the Supreme Court of Tennessee has said:

"That the exercise of an occupation or business which requires a license from some proper authority, designated by a general law, and not open to all or any one without such license, is a privilege within the meaning of the Constitution."

State vs. Schiller, 50 Tenn., 281.

The Supreme Court of Tennessee has held that the holder of such a license cannot sell liquor—that is, carry on the business of a liquor dealer—at any place other than the building and establishment named in the license.

State vs. Butler, 1 Shannon's Cases, 91.

Four-mile Law.

Chapter 1 of the acts of 1909, commonly known as the Four-mile Law, is as follows:

"AN ACT TO PROHIBIT THE SALE OF INTOXICATING LIQUORS AS A BEVERAGE NEAR ANY SCHOOLHOUSE, PUBLIC OR PRIVATE, WHERE A SCHOOL IS KEPT, WHETHER THE SCHOOL BE IN SESSION OR NOT.

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That it shall not hereafter be lawful for any person to sell or tipples any intoxicating liquors, including wines, ale and beer, as a beverage, within four miles of any schoolhouse, public or private, where a school is kept, whether the school be then in session or not, in this State, and that any one violating the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine for each offense of not less than fifty dollars nor more than five hundred dollars and imprisonment for a period of not less than thirty days nor more than six months.

"SECTION 2. *Be it further enacted*, That the grand juries shall have and exercise inquisitorial power in respect to violations of this act; and it shall be the duty of the circuit and criminal judges of the State to give the same in charge to them.

"SECTION 3. *Be it further enacted*, That all laws in conflict with this act be, and the same are hereby repealed.

"SECTION 4. *Be it further enacted*, That this act take effect from and after July 1, 1909, the public welfare requiring it."

The Supreme Court of Tennessee, in construing this act, held that it forbids all beverage sales of intoxicating liquors in this State, and, in fact, all sales except those made by druggists upon the prescription of a physician and sales for mechanical, medicinal, sacramental, scientific, chemical,

and like purposes, which are declared to be non-beverage sales.

Kelly vs. State, 15 Cates, 123 Tenn., 550.

In dealing with this act this same court announced the following propositions: (1) That it is the general rule with regard to the sales of personal property that it is complete and the title passes as soon as the parties have agreed upon the terms, and that delivery is not essential to the passing of title; (2) that when such goods are ordered through the mail it is necessary that the assent of the person from whom the order is made shall be communicated to the person making the order, but that this assent may be accomplished by filling the order and delivering the goods to a common carrier to be transported to the person making the order; (3) that when a commodity has been delivered to a common carrier to be transported on a continuous voyage or trip beyond the limits of the State where delivered, the character of interstate or foreign commerce attaches; (4) that the Wilson act, which provides that all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining for use, consumption, sale or storage therein, shall, upon arrival in such State or Territory, be subject to the protection and effect of the laws of such State or Territory enacted in the exercise of its police power, to the same extent and in the same manner as if such liquids and liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise, has reference only to intoxicating liquors brought into the State and does not relate to and control such liquors when sent out of the State; (5) it was therefore held that where liquors were stored in Tennessee and sold upon such mail order to pass outside of the State by delivery to a common carrier, that said act was not thereby violated.

State vs. Kelly, 123 Tenn., 563-4-5-8.

Manufacturers' Bill.

Chapter 10 of the acts of 1909 is as follows:

"AN ACT TO PROHIBIT THE MANUFACTURE IN THIS STATE OF INTOXICATING LIQUORS FOR THE PURPOSE OF SALE.

"SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That it shall not hereafter be lawful for any person or persons to manufacture in this State, for the purposes of sale, any intoxicating liquor, including all vinous, spiritous, or malt liquors, and that any one violating the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine, for each offense, of not less than \$250 nor more than \$1,000, and imprisonment for a period of not less than ninety days nor more than twelve months: Provided, This section shall not be construed as to prohibit the manufacture of alcohol of not less than 188 proof for chemical, pharmaceutical, medical, and bacteriological purposes.

"SECTION 2. Be it further enacted, That the grand juries of this State shall have and exercise inquisitorial power in respect to violation of this act, and it shall be the duty of the circuit and criminal judges of the State to give the same in charge to them.

"SECTION 3. Be it further enacted, That all laws in conflict with this act be, and the same are, hereby repealed.

"SECTION 4. Be it further enacted, That this act shall take effect from and after January 1, 1910, the public welfare requiring it."

It was held that this act was within the valid and constitutional police powers of the State of Tennessee, and that its passage and enforcement was therefore violative of no clause of either the State or Federal Constitutions.

Motlow *vs.* The State, 17 Cates, 125 Tenn., 548.

Chapter 479 of the Acts of 1909.

This said chapter and the particular sections and provisions now under review have been construed and passed upon by the Supreme Court of Tennessee in two notable cases. In the first case the act was sought to be applied to a dealer in soft drinks, which were not in point of fact intoxicating; that is, drinks which did not contain a sufficient quantity of alcohol to intoxicate. The court sustained the validity of the act but held it did not apply to said dealers in "soft" drinks. The court furthermore held in this case that this act was passed to aid in the enforcement of the Four-mile Law, above quoted, and as construed by it; that it was not only a revenue measure, but it was, at the same time, a police regulation and measure resorted to by the State to aid in the enforcement of its liquor laws, one of which was the said Four-mile Law.

Austin vs. Shelton, 122 Tenn., 14 Cates, 637.

In the second of these cases a liquor dealer at Jellico, in the State of Tennessee, who, as does plaintiff in error in this case, claimed to be an interstate dealer exclusively, and sought to avoid the payment of the taxes prescribed by this act, first, upon the ground that it did not apply to him as an interstate dealer in liquors, and, second, if it did, that it was violative of the said commerce clause of the Constitution.

Logan vs. Brown, 125 Tenn., 209.

This case will be dealt with hereinafter more in detail.

From the foregoing it will be seen that the following conditions exist in Tennessee with respect to the liquor traffic:

(1) That intoxicating liquors cannot be manufactured in this State;

(2) That intoxicating liquors cannot be sold within four miles of a school-house, which covers the entire territory of Tennessee; that under this last mentioned act there can

be no legal sale of intoxicating liquors within the State of Tennessee and to her citizens except those made by druggists upon the prescription of a physician and sales made for mechanical, medicinal, sacramental, chemical, and scientific purposes, or sales made to persons outside of the State upon mail orders, the acceptance of which are manifested by the delivery of the liquors to an interstate carrier for continuous transportation out of the State, as defined in the said Kelly case hereinbefore quoted and set out;

(3) That in addition to the penalties prescribed by the Four-mile Law and other laws this State, as one of its police regulations as well as for revenue purposes, passed said chapter 479 of the acts of 1909. That the same has been maintained by the Supreme Court of the State in its application to intrastate liquor dealers who sell liquors which are, in point of fact, intoxicating, and that it also applies to interstate liquor dealers, such as plaintiff in error represents itself to be in this record, and that in its application to such dealers the same is not violative of the commerce clause of the Federal Constitution.

III.

It will be seen by a comparison of the statement of facts in this case with that of the case of the Southern Operating Company *et als. vs. W. P. Hayes et als.*, which is No. 122 upon the docket of this court, that the two cases are identical. The two bills contain the same averments of fact and the same assaults upon said statute. The demurrers of the defendants in error of the two cases make identically the same questions. The two cases were heard together in the chancery court of Hamilton County and the Supreme Court of the State and were decided upon the same day. The decrees entered both in the chancery court and the Supreme Court with respect to the two cases are the same.

In the case of the Southern Operating Company *et als. vs.* W. P. Hayes *et als.*, No. 122 upon the docket of this court, beginning with the third Roman numeral thereof, under the heading of "Logan *vs.* Brown Analyzed," there has been submitted an argument and authorities upon each and all of the questions involved in both cases.

In view of the fact that it is the purpose of both sides to request that the two cases be argued together orally, it is thought that a repetition of the argument contained in the brief in cause No. 122 would be a burden upon the court and the same is, therefore, referred to in support of the contentions made in this case and asked to be taken in lieu of a reiteration herein in this brief.

Respectfully submitted,

FRANK M. THOMPSON,
Attorney General of Tennessee.
C.



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INDEX

<i>Statement of the Case</i>	1-6
<i>Assignment of Errors</i>	6-9
<i>Brief and Argument</i>	9-24
<i>Revenue Act of Tennessee</i>	25-28

AUTHORITIES REFERRED TO.

<i>Adams Express Co. vs. Iowa</i> , 196 U. S., 133	12
<i>Addyston Pipe & Steel Co. vs. U. S.</i> , 175 U. S., 239	12
<i>American Steel & Wire Co. vs. Speed</i> , 102 U. S., 500	17
<i>Asher vs. Texas</i> , 128 U. S., 129	14
<i>Brennen vs. Tittersville</i> , 153 U. S., 289	14
<i>Cargill vs. Minnesota</i> , 180 U. S., 452	18
<i>Covington Bridge Co. vs. Kentucky</i> , 154 U. S., 205	14
<i>Crenshaw vs. Arkansas</i> , 227 U. S., 389	11
<i>Crutcher vs. Kentucky</i> , 141 U. S., 47	14
<i>Delamater vs. South Dakota</i> , 206 U. S., 97	20
<i>Dozier vs. Alabama</i> , 218 U. S., 123	21
<i>Ferry Co. vs. East St. Louis</i> , 107 U. S., 365	17
<i>Ficklen Taxing District</i> , 146 U. S., 1	17
<i>Galveston H. & S. A. R. Co. vs. Texas</i> , 210 U. S., 217	22
<i>General Oil Co. vs. Crane</i> , 209 U. S., 211	17
<i>Kelly vs. State</i> , 123 Tenn., 550	9
<i>Kidd vs. Pearson</i> , 128 U. S., 24	19
<i>Logan vs. Brown</i> , 125 Tenn., 209	17
<i>Moran vs. New Orleans</i> , 112 U. S., 69	14
<i>Nathan vs. Louisiana</i> , 8 Howard, 80	18
"Pipe Trust Case," 85 Federal, 271	15
<i>Richard vs. Mobile</i> , 208 U. S., 479	20
<i>Robins vs. Taxing District</i> , 120 U. S., 489	14
<i>State vs. Applegarth</i> , 28 L. R. A., 813	19
<i>Stockard vs. Morgan</i> , 105 Tenn., 412	15
<i>Stockard vs. Morgan</i> , 185 U. S., 30	16
<i>U. S. vs. Knight Co.</i> , 156 U. S., 11	11
<i>Vance vs. Vanderhook</i> , 170 U. S., 44	12
<i>Vest vs. Kans. Gas Co.</i>	13



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1914.

No. 475.

SOUTHERN OPERATING COMPANY, PAUL
HEYMAN, and H. W. STEINER,
Plaintiffs in Error,

vs.

W. P. HAYES, County Court Clerk of Hamilton
County, Tennessee; J. PARKS WORLEY, State
Revenue Agent of the State of Tennessee,
and SAM A. CONNOR, Sheriff of Ham-
ilton County, Tennessee, Defend-
ants in Error.

BRIEF ON BEHALF OF THE PLAINTIFFS IN
ERROR.

STATEMENT OF THE CASE.

May it Please the Court:

This case is here on writ of error to the Supreme Court of the State of Tennessee. The case involves the right of the State of Tennessee to levy a privilege tax on the interstate sales of liquors made by the plaintiffs in error.

The original bill was filed in the Chancery Court at Chattanooga, by the plaintiffs in error against W. P. Hayes, Clerk of the County Court, J. Parks Worley, Revenue Agent of the State of Tennessee, and Sam A. Connor, Sheriff of Hamilton County, Tennessee, alleging substantially the following facts:

(a) Complainants on January 1, 1912, were and since that time have continuously been engaged exclusively in interstate sales of liquor.

(b) That they lawfully owned and had in their possession a large stock of spirituous liquors.

(c) That on account of a recent enactment of the Legislature, regulating domestic traffic in intoxicating liquors, complainants have since the date mentioned abandoned all intrastate dealings in liquor—have not since that time sold or offered for sale, or handled for sale, any liquors to any person, firm or corporation in Tennessee, nor did they desire or intend to conduct any sort of intrastate trade in Tennessee.

(d) The manner in which complainants have conducted their business since January 1, 1912, and still conduct their business is as follows and not otherwise: They receive orders from residents and citizens of other States for the shipment of liquors to said residents and citizens of other States. Upon receipt of such orders the complainants ship the liquors to said non-residents by delivering said liquors for shipment to railroads engaged in interstate business for de-

livery to said persons at points in other States So that the complainants are engaged exclusively in the interstate sale and shipment of liquors, and in no other respect are they doing business.

(e) When orders are received from non-residents, liquors are delivered to railroads engaged in interstate traffic, for delivery only to points beyond the State of Tennessee to non-resident purchasers.

(f) Complainants have complied with all the revenue laws of the United States and of the State of Tennessee, and they have paid the Federal taxes assessed against them as liquor dealers, and have paid the necessary Federal license.

(g) They have paid the State, County and City taxes on their stock of liquors and all their property and the ad valorem tax based upon their stock of goods commonly known as "Merchants' Tax."

(h) They have paid all privilege taxes prior to January 1, 1912.

(i) It was further alleged that defendants, Worley as Revenue Agent, and Hayes as County Court Clerk, had assessed complainants with a privilege tax amounting to \$500.00 on the interstate business carried on by complainants, and had issued a distress warrant for said tax, and placed same in the hands of Sam A. Connor, Sheriff of Hamilton County, for collection.

(j) The said officials claimed this privilege tax was authorized by the Act of the General

Assembly of the State of Tennessee, passed in 1909, Chapter 479.

Section IV of same provides, among other things, as follows:

"That such vocation, occupation and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the County Court Clerk as provided by law for the collection of Revenue."

Among the occupations enumerated is that of "Liquor Dealers."

"Liquor Dealers" are defined in the Act to be:

"Every person, company or firm selling spiritous, vinous or malt liquors, beer or ale, or intoxicating bitters, or any medicated or adulterated cider, or any social club or association, incorporated or otherwise, which handles such liquors for sale."

(So much of this Act as is material to this issue is herewith appended.)

(k) It was alleged that this privilege tax was illegal as against complainants—(1) because the Act was not intended to apply to those dealing in interstate commerce; and (2) because, if the Act did apply to interstate commerce transactions, then it was void because in conflict with the Commerce Clause of the Constitution of the United States.

(1) Complainants prayed for an injunction to restrain the collection of said illegal tax.

(R. pp. 2 to 8.)

Defendants filed both a demurrer and answer to the bill.

(R. pp. 9-11.)

An amended and supplemental bill was filed stating Complainants' case more in detail.

(R. pp. 12 to 18.)

The defendants were permitted to withdraw their answer and stand on their demurrer. On the trial the Chancellor overruled the demurrer and enjoined the collection of the tax complained of.

(R. pp. 19-20.)

On appeal to the Supreme Court the case was reversed and plaintiffs' bill dismissed.

(R. pp. 65-66.)

Both in this bill and in the brief filed by plaintiffs in error to the Supreme Court of Tennessee, it was insisted that the privilege tax in question was a violation of the Commerce Clause of the Constitution of the United States.

(R. pp. 28-62.)

It is not denied that this Federal question was properly raised.

On proper petition the case was brought to this Court by writ of error to the Supreme Court of Tennessee.

(R. pp. 66 to 73.)

With the petition for writ of error plaintiff in error filed the following:

ASSIGNMENT OF ERRORS.

I.

The Court erred in holding that Chapter 479 of the Acts of the General Assembly of the State of Tennessee, for 1909, and the laws of Hamilton County, Tennessee, passed pursuant thereto, are, as applied to plaintiff in error, Southern Operating Company, and its business, and persons and businesses of a like class, valid and not repugnant to, or in violation of, Article One, Section 8, Sub-section 3, of the Constitution of the United States.

II.

The Court erred in holding that the authority exercised, and attempted to be exercised, by the defendants in error, and their acts and threatened acts in the premises, under and by virtue of said Chapter 479, of the Acts of the General Assembly of the State of Tennessee, for 1909, and the laws of Hamilton County, Tennessee, passed pursuant thereto, in threatening and attempting to assess, levy and col-

lect from plaintiff in error, Southern Operating Company, as aforesaid, said State and County privilege taxes, and each of them, and the costs, fees, penalties, etc., thereto annexed, authorized and prescribed, were valid, and not in violation of Article One, Section 8, Sub-section 3 of the Constitution of the United States.

III.

The Court erred in denying to plaintiff in error, Southern Operating Company, the rights, privileges and immunities claimed by it under said provision of the Federal Constitution; (a) as to the State tax; (b) as to the County tax.

IV.

The Court erred in holding that the plaintiff in error, Southern Operating Company, was not engaged exclusively in the occupation of carrying on interstate commerce; and that said tax upon its said occupation did not impose a burden upon interstate commerce within the meaning of said provision of the Federal Constitution.

V.

The Court erred in denying the relief prayed as to the County tax, and in dismissing the bill as to the same.

VI.

The Court erred in denying the relief prayed

against the assessment of the State tax, and in dismissing the bill as to the same.

VII.

The Court erred in denying the relief sought as against the collection of the State tax, and in dismissing the bill as to the same.

VIII.

The Court erred in: (a) Reversing the decree of the Chancellor, dissolving the injunction, dismissing the bill, sustaining the demurrers, sustaining the assignments of error, rendering judgment against plaintiff in error, the said Southern Operating Company, and its sureties, Paul Heyman and H. W. Steiner, for the cost of the cause, and awarding execution upon the same: (first) as to so much of said bill as sought relief against the assessment and collection of the County tax; (second) against so much of the bill as sought to enjoin the assessment of the State tax; and (third) as to so much of the bill as sought to enjoin the collection of the State tax. (b) And in remanding so much of the cause to the Chancery Court of Hamilton County, Tennessee, as was necessary to enable the defendants in error to take such proceedings as might be proper to collect from plaintiff in error, and its sureties on the injunction bond, such damages as may have been sustained by the defendants in error incident to the alleged wrongful suing out of said injunction: (First) as to so

much of the bill as sought relief against the County tax; and (second) as to so much of the bill as sought relief against the assessment of the State tax; and (third) as to so much of the bill as sought relief against the collection of the State tax.

BRIEF AND ARGUMENT.

Plaintiffs in error had on hand a large stock of liquors in Chattanooga, Tennessee, and on account of the anti-liquor law passed by the State, the intrastate sales of this liquor became unprofitable. The intrastate sale of said liquors could only be made for medicinal, chemical and manufacturing purposes, and it became unprofitable to conduct such a business. They, therefore, on January 1, 1912, began the sale of said liquors, to non-residents only.

The Supreme Court of Tennessee decided that the sale of these liquors to non-residents was not prohibited by the state statute, and that the statute would have been invalid if it had attempted to prohibit such sales.

Kelly vs. State, 15 Cates (123 Tenn.) 550.

These goods were lawfully on hand. Taxes had been paid upon same just as on any other property in the State, and it is not pretended that they were subject to any further tax while *at rest* in the warehouse. Exercising their rights under the constitution of the United States, plaintiffs in error began the sale and transportation of their goods to non-resi-

dents. Thereupon, and for this, the privilege taxes complained of were assessed and collected.

It is, therefore, too clear for argument that this tax was simply a tax upon the sale of said goods to non-residents. Indeed, the distinguished attorney general in his brief concedes that this is true. (Page 44 of his brief in cause 475) he says:

"By Section 991 the *right to sell* intoxicating liquors is declared to be a taxable *privilege* in the sense of the 28th Section of Article 2 of the Constitution of Tennessee quoted."

After quoting from that part of the Act defining liquor dealers, (At Page 46 of his brief,) he says:

"It is submitted that this language but strengthens the idea that the right to engage in the business, occupation, or vocation of *selling intoxicating liquors* is, under the laws of Tennessee, created a privilege and, as such, taxed."

In so far as this tax applies to intrastate sales of liquors it is valid. But in so far as it applies to interstate sales we submit it is not valid.

Can the State of Tennessee tax the *interstate* sale of any commodity by simply calling same a privilege, and taxing it as such?

That the sale of goods kept on hand in one State to residents of other States, and the interstate shipment and delivery of same pursuant to such sale, is

interstate commerce, would seem too clear for argument or cavil.

In the case of *U. S. vs. Knight Company*, 156 U. S., 11, the question of the power of the Federal Government under the Commerce clause of the Constitution was involved. Among other things, the court said:

"Contracts to buy, sell or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purpose of such transit among the States, or put in the way of transit, may be regulated, but this is because they form a part of interstate trade or commerce."

In the case of *Addyston Pipe & Steel Company vs. United States*, 175 U. S., 239, the Court, among other things, said:

"The direct and immediate result of the combination was, therefore, necessarily, a restraint upon interstate commerce in respect of any of the articles manufactured by any of the parties to it to be transported beyond the State in which they were made. The defendants, by reason of this combination and agreement, could only send their goods out of the State in which they were manufactured for sale and delivery in another State, upon the permission and pursuant to the provisions in said combination. As pertinently asked by the Court below, was this not a direct restraint upon interstate commerce in these goods?"

And again :

"A sale for transportation beyond the State makes the transaction a part of interstate commerce."

And gain :

"As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens and inhabitants of different States, and includes not only the transportation of persons and property in the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities."

In the case of *Vance v. Vandervook*, 170 U. S., 44, the Court said :

"Equally well established is the proposition that the right to send liquor *from one State into another, and the act of sending the same*, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress; and hence that State law which denies such a right, or substantially interferes with or impairs the same, is in conflict with the Constitution of the United States."

And again :

"But the right of a person in one State to ship liquors into another State to a resident for his own use is derived from the Constitution of the United States and does not rest on the grant of State law."

In the case of *Adams Express Company v. Iowa*,

196 U. S., 133, Mr. Chief Justice White, said:

"Those cases rested upon the broad principle of the freedom of commerce between the States, and of the right of a citizen of one State to freely contract to receive merchandise from another State and of the equal right of the citizen of a State to contract to send merchandise into other States."

In the case of *West vs. Kansas Natural Gas Company*, 221 U. S., 229, this court held the statute of Oklahoma prohibiting the piping of gas out of the State, illegal as a violation of the Commerce clause of the Constitution.

Among other things, this court said:

"At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of the state, and that it cannot be regulated or restrained by a state, or that the State cannot exclude from its limits a corporation engaged in such commerce."

It is therefore clear that the plaintiffs in error were engaged alone in interstate commerce, and that the State of Tennessee has attempted to tax this commerce, as a privilege.

As stated by the court in the case just cited, the right to carry on interstate commerce, *is not the gift of a State.*

As stated in the *Vandervook* case, *supra*:

This right "is derived from the Constitution of the United States, and does not rest on the grant of State law."

If then, these plaintiffs in error had a right under the commerce clause of the Constitution of the United States to sell this property to citizens and residents of other states, can the State of Tennessee tax the exercise of this right by calling same a "privilege"?

That a State cannot tax interstate commerce would appear to be too well settled for serious argument.

- Crenshaw vs. Arkansas, 227 U. S., 389.
- Stockard vs. Morgan, 185 U. S., 30.
- Brennen vs. Tittersville, 153 U. S., 289.
- Crutcher vs. Kentucky, 141 U. S., 47.
- Robins vs. Taxing District, 120 U. S., 489.
- Asher vs. Texas, 128 U. S., 129.
- Moran vs. New Orleans, 112 U. S., 69.
- Gloucester Ferry Company vs. Pennsylvania, 114 U. S., 204.
- Covington Bridge Company vs. Kentucky, 154 U. S., 205.

It is true there are a line of cases holding that instrumentalities of interstate commerce are subject to taxation and to some extent regulation by the State.

It is true that property intended for interstate commerce *at rest* in a State may be taxed by the State

just as any other property within the state may be taxed.

It is true that the State in the exercise of its police power may prohibit the manufacture of goods, although the same may be intended for interstate commerce. It is also true that the State may pass quarantine and inspection laws with reference to property that is the subject of interstate commerce.

A discussion of the cases dealing with these various questions would be a useless consumption of the Court's time. The bald question we have in this case is whether the State can assess a *tax* on interstate commerce.

As said by Judge Taft in the "Pipe Trust Case," 85 Federal, 271:

"Contracts for sales of such articles to be delivered across State lines, and the negotiations and bids preliminary to the making of such contracts, all of which, as we have seen, do not merely affect interstate commerce, *but are interstate commerce.*"

We cannot escape the conclusion that the tax questioned in this case is a tax upon commerce itself.

The right of the State of Tennessee to tax interstate commerce under the guise of assessing a privilege on an occupation has been settled by this court.

In the case of *Stockard vs. Morgan*, 105 Tennessee,

412, it was decided that brokers in the City of Chattanooga, with established offices and places of business, who solicited orders from merchants in that city to various non-resident manufacturers and jobbers, and had goods shipped to these local merchants, were subject to a privilege tax.

It was insisted that this was a tax upon interstate commerce, to which the Supreme Court of Tennessee responded :

“We do not think so. The law does not discriminate. The tax is on the privilege of doing such business in the state without regard to the customers sought or principals represented. The thing taxed is the occupation of merchandise brokerage, not the business of those employing, whether they be domestic or foreign principals.”

On appeal to this court the case was *reversed* in the case of Stockard vs. Morgan, 185 U. S., 27.

Among other things, Mr. Justice Peckham, speaking for the Court, said :

“It is in effect a tax upon interstate commerce, and that fact is not in anywise altered by calling the tax one upon the occupation of the individual residing within the state while acting as the agent of a non-resident principal. The tax remains one upon interstate commerce, under whatever name it may be designated.”

And again :

"Although the State has general power to tax individuals and property within its jurisdiction, yet it has no power to tax interstate commerce even in the person of a resident of the State."

In the case at bar, the Supreme Court of Tennessee referred to the recent case of *Logan vs. Brown*, 125 Tenn., 209, as expressing the opinion of the Court on the question involved.

The Court in that case referred to the case of *Ficklen v. Taxing District*, 146 U. S., 1, as authority for sustaining this tax.

In the *Ficklen* case the parties complaining had taken out a license to do a *general* commission business and had *paid* for that privilege. That case was distinguished in the *Stockard* case just referred to, and also in the case of *Brennen vs. Tittersville*, *supra*.

In the case of *Logan vs. Brown*, the Supreme Court also referred to the cases of *American Steel & Wire Company vs. Speed*, 102 U. S., 500, and *General Oil Company vs. Crane*, 209 U. S., 211.

These cases simply involve the right to tax property that had come *to rest* within the limits of the State.

The Court also referred to the case of *Ferry Company vs. East St. Louis*, 107 U. S., 365, and cases cited. It is manifest that these cases simply involved a tax on property as such, and not on commerce. Un-

questionably the instrumentalities of commerce may be taxed.

The Court also referred to *Cargill vs. Minnesota*, 180 U. S., 452.

That case involved the validity of a tax upon an elevator business. While all the wheat sold by the company taxed was to persons outside the State, still the company did a general elevator and warehouse business, and the tax was upon such business.

Describing this business thus taxed, the Court said :

“Under these circumstances the warehouse is a sort of public market place, where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as marketmaster, weighmaster, inspector, and grader of the grain. Surely such a business is of a public character, and is sufficiently affected with a public interest to warrant a very considerable amount of regulation of it by the State.”

It is thus clear that none of the cases cited by the Court in the *Logan* case involved the right to tax interstate commerce. The reasoning of the Court in the *Logan* case was the same as in the *Stockard* case which was disapproved and reversed by this Court.

The distinguished Attorney General also refers to the case of *Nathan vs. Louisiana*, 8 Howard, 80. This case simply involves the validity of a tax on an ex-

change broker who dealt in foreign bills of exchange. It was insisted that his business was protected as interstate commerce, because "a tax upon the exchange broker is a tax upon the *instruments* of commerce."

Of course, this was not a tax on interstate commerce, nor invalid as such.

The case of *State vs. Applegarth*, 28 L. R. A., 813, decided by the Supreme Court of Maryland is also referred to. It was simply held in that case that the tax on the business of packing and canning oysters for sale and transportation was not a tax on interstate commerce. Manifestly, it was not. It is clear that the State may tax, regulate or prohibit the manufacture of any articles of trade or commerce, within the State. The fact that the manufacturer *intends* to use the same in interstate traffic does not interfere with the State's right to tax, but, after same has been manufactured, and is on hand as a part of the property of the owner, the State may not interfere with nor tax the *sale* of same to citizens of other States. The right to manufacture or produce the articles, or sell them in intrastate traffic, is a right derived from the State. The right to sell these articles to citizens and residents of other states is a right derived from the United States, and can neither be taxed nor interfered with by the State.

This distinction was clearly announced in the case of *Kidd vs. Pearson*, 128 U. S., 24, cited by adversary counsel.

The case of *Delamater vs. South Dakota*, 206 U. S., 97, is referred to by the Attorney General as applicable to this case. In that case it was simply held, by virtue of the Wilson Act, that the State of South Dakota had a right to tax the business of an agent soliciting orders within the State for liquors to be shipped into the State. This was because the Wilson Act had expressly conferred upon the State the power to regulate and control the sale of liquors shipped into the State. Certainly, it was not intended by the Wilson Act to confer upon the State the power to tax interstate commerce in liquors to be shipped *out* of the State. On the contrary, the power was confined to the right of the State to regulate the sale of liquors *within* the State after same should be shipped into the State from another State. The same principle is announced in the case of *Richard vs. Mobile*, 208 U. S., 479, cited in adversary counsel's brief.

In no case has it been held that interstate commerce as such may be taxed by the State.

Adversary counsel seek to distinguish the case of *Stockard vs. Morgan* and other cases, on the ground that in these cases, the agent or broker making the sale was within the State and made such sales as agent for principals, who were without the State at the time. Manifestly, no such distinction was in the mind of the Court in deciding these cases. In the *Stockard* case, the tax sought to be assessed was against the resident brokers on the business transacted by them, and the Court said that the State has

no power "to tax interstate commerce even in the person of a resident of the State."

The facts of cases differ of course—but in all the cases in this Court when the facts have shown an attempt to tax interstate commerce the tax has been held invalid.

In the case of *Dozier vs. Alabama*, 218 U. S., 123, the plaintiff in error was convicted and sentenced to pay a fine because he did business without paying a license tax required by the State of Alabama. In that case, it appeared that the orders for the pictures and frames were received by the agent within the State and sent to him from the principal without the State, with the option given to the purchaser to take or decline the frames when same should be presented by the agent. It was therefore, held by the Supreme Court of Alabama that this was an *intra-state* and not an *inter-state* transaction, and hence the tax was valid. The case was reversed by this Court:

Mr. Justice Holmes, speaking for the Court, said:

"No doubt it is true that the customer was not bound to take the frame unless he saw fit, and that the sale of it took place wholly within the State of Alabama, if a sale was made. But, as was hinted in *Rearick vs. Pennsylvania*, 203 U. S., 507, 512; 51 L. Ed., 295, 297; 27 Sup. Ct. Rep., 159, what is commerce among the States is a question depending upon broader considerations than the existence of a technically binding con-

tract or the time and place where the title passed."

This is a complete answer to the insistence that because the sales were made within the State the same were therefore taxable by the State.

In the case of *Galveston, H. & S. A. R. Co. vs. Texas*, 210 U. S., 217, the validity of a tax on the income from railroads whose lines were *wholly within the State*, was involved. The Court said:

"The lines of the railroad concerned are wholly the State, but they connect with other lines, and a part, in some instances much the larger part, of their gross receipts is derived from the carriage of passengers and freight coming from, or destined to, points without the State."

This Court held the tax a violation of the commerce clause of the Constitution, because it was a tax upon interstate commerce. The Court very clearly pointed out the difference between the taxation of *property* and the taxation of *commerce*.

Mr. Justice Holmes speaking for the Court said:

"Neither the State Courts nor the Legislatures by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be save by name or form."

The concluding clause of Section 16 of the Tennessee Act in question reads as follows:

"But this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce."

Section 16 provides that it shall be a misdemeanor to exercise any of the privileges provided for in the Act without having paid the required tax. The distinguished Attorney General says in his brief at Page 46:

"It is evident that this last quoted language applies alone to the inhibition of said Section 16 and more particularly that it applies alone to the fine imposed therein. It is perfectly apparent that the legislature was of the opinion that the imposition of a fine upon one engaged in interstate commerce would be a burden upon such interstate commerce within the rules laid down by this Court. This Section 16, and particularly this last line and a half, was incorporated in this act, not because the privilege tax provided for liquor dealers did not, under it, apply to those engaged in interstate sales, but because the legislature was of the opinion that the imposition of a fine for the violation of the act by an interstate dealer would render the whole act obnoxious to the commerce clause of the Constitution under the rules announced by this Court."

In other words, it is insisted that this Act was passed for the purpose of *taxing* interstate commerce, but that the Legislature was afraid that it would render the Act obnoxious to the commerce clause of

the constitution to provide a *punishment* for the failure to pay the tax for the privilege of doing an interstate commerce business.

But it is clear that the State may no more tax interstate commerce than it can punish a citizen for a failure to pay the tax.

The only question is whether this is a tax on interstate commerce. Confessedly it is and hence it is invalid.

Respectfully submitted,

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Of Counsel.

"CHAPTER 479.**"AN ACT TO PROVIDE REVENUE FOR THE
STATE OF TENNESSEE AND THE COUNTIES
AND MUNICIPALITIES THEREOF.**

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, That the taxes on every \$100 worth of property shall be 50 cents for the year 1909, and for every subsequent year thereafter, 35 cents of which shall be for state purposes and 15 cents for school purposes; that there shall be levied and collected a collateral inheritance tax as provided for in Chapter 174 of the acts of 1893 and acts amendatory thereof.

"Section 2. Be it further enacted, That the several county courts of this State be, and they are hereby, authorized and empowered to levy an annual county tax on every \$100 worth of taxable property not exceeding 30 cents upon the \$100 worth of property, and exclusive of the tax for public roads and pikes and schools and interest on county debts and other special purposes; and each county and municipality in this State is hereby authorized and empowered to levy a privilege tax upon merchants and such other vocations, occupations, or businesses as are named in this act and declared to be privileges, not exceeding in amount that levied by the State for State purposes. The imposition of a privilege tax under this act shall not be construed as a release or

exemption from an ad valorem tax unless otherwise expressly provided; nor shall this act be construed as repealing any special act heretofore passed imposing a privilege tax: Provided, That any indigent ex-Confederate or ex-Federal soldier doing a privilege business, with a capital not exceeding \$250, shall be exempt from paying the privilege tax herein provided for.

"Section 3. Be it further enacted, That all merchants shall pay an ad valorem tax upon the average capital invested by them in their business of 50 cents on the \$100, 35 cents of which shall be for State purposes and 15 cents for school purposes; and a privilege tax of 15 cents on each \$100 worth of taxable property, 7½ cents of which shall be for school purposes and 7½ cents for State purposes: Provided, That such privilege tax, without regard to the length of time they do business, shall in no case be less than \$5. The \$5 paid shall be a credit when the balance of the tax is paid: Provided, further, That said \$5 shall be equally divided between the State and counties: Provided, further, That when the stock is less than \$800, the privilege shall be fixed at \$7.50 per annum, and that no ad valorem shall be taxed.

"Section 4. Be it further enacted, That each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid

to the county court clerk as provided by law for the collection of revenue.

"LIQUOR DEALERS.

"Wholesale, and, in addition, taxed as other merchants\$500.00

"Detail, taxed as other merchants, and, in addition, shall pay as follows:

"In cities, taxing districts, or towns of 6,000 inhabitants or over, each per annum 500.00

"At any place, city, taxing district, or town of less than 6,000 inhabitants, each, per annum 500.00

"Persons selling beer or any quantity of liquors on steamboats, flatboats, or any other vessel or water craft or from railroad cars, shall pay a tax, each, in lieu of all other taxes to be paid in any county they may elect, per annum 500.00

"Persons selling liquors in quantities of one quart or more, except manufacturers selling to dealers in original packages of not less than five gallons, are wholesale dealers, and persons selling smaller quantities than five gallons are retail dealers; and the tax on liquor dealers applies to all drug stores, except in uses of wine for sacramental purposes and alcohol for domestic purposes. No producer of grape wine, where they raise and make the wine themselves, shall pay any privilege tax for selling the same.

"Provided, They shall not sell in quantities of less than one and a half ($1\frac{1}{2}$) gallons.

"Liquor dealers are defined as every person, company, or firm selling spirituous, vinous, or malt liquors, beer or ale, or intoxicating bitters, or any medicated or adulterated cider, or any social club or association, incorporated or otherwise, which handles such liquors for sale. The procuring of United States revenue license to wholesale or retail liquor dealers shall be taken as prima facie evidence that the parties are in the wholesale or retail liquor business, and are subject to State and county taxes, unless established by proof that they are not so engaged. Upon any clerk's receiving knowledge of such internal revenue license, he shall have a right to collect the taxes by distress warrants.

"Provided, That nothing in this act shall authorize or legalize the sale of liquors."

* * * * *

"Section 16. Be it further enacted, That it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the taxes prescribed for the exercise of the same, and all parties so offending shall be liable to a fine of not less than \$10 nor more than \$50 for each day such privilege is exercised without license; but this inhibition shall not apply to any person, firm or corporation engaged in interstate commerce."

Office Supreme Court, U. S.

FILED

NOV 16 1914

JAMES D. MAHER

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1914.

No. 122.

SOUTHERN OPERATING COMPANY, PAUL HEY-
MAN, AND H. W. STEINER, PLAINTIFFS IN ERROR,

vs.

W. P. HAYES, COUNTY CLERK OF HAMILTON COUNTY,
TENNESSEE, AND J. PARKS WORLEY, STATE REVENUE
AGENT OF THE STATE OF TENNESSEE, DEFENDANTS IN
ERROR.

BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR,
W. P. HAYES, CLERK, AND J. PARKS WORLEY,
STATE REVENUE AGENT.

FRANK M. THOMPSON,
Attorney-General for Tennessee.



TOPICAL INDEX.

	Page.
1. General statement of case.....	1
(A) Amended bill ordered to stand in room and stead of original bill.....	2
(B) Chapter 479 of Acts of General Assembly for 1909 assailed as repugnant to commerce clause of Federal Constitution	2
2. Pleading	5
(A) Averments of original bill.....	5
(B) Demurrer	10
3. Disposition of case by chancellor.....	10
(A) Demurrer overruled	10
(B) Chapter 479 held violative of commerce clause of Federal Constitution	11
(C) Appeal prayed, granted, and perfected to State su- preme court	11
4. Trial and disposition of case in State supreme court.....	11
(A) Assignments of error by attorney general for de- fendants	11
(B) Opinion of State supreme court.....	12
(C) Decree of said supreme court.....	13
(D) Petition for writ of error.....	14
(E) Assignment of error in support of said petition....	14
(F) Writ of error granted.....	14
(G) General concluding statement.....	14
5. Other constitutional provisions and statutes to be construed <i>in pari materia</i> with said chapter 479.....	15
(A) Constitution of Tennessee, art. 1, sec. 28.....	15
(B) Code provisions rendering the business of liquor dealers a privilege.....	16
(C) Four-mille law and construction thereof by State supreme court	17
(D) Manufacturers' bill and construction thereof by supreme court	19
(E) Construction of said chapter 479, act 1909, by State supreme court	20
6. Logan vs. Brown, 125 Tennessee, 211 analyzed.....	22
(A) Facts	22
(B) Willson act applied.....	23
(C) Logan not protected by commerce clause of Consti- tution	24
(D) Reasons assigned by State supreme court.....	28

	Page
7. Plaintiffs in error's cases distinguished.....	28
(A) These cases are as follows:.....	28
Brennan vs. Titusville, 153 U. S., 289; 38 L. Ed., 720.	
Crutcher vs. Kentucky, 141 U. S., 47; 31 L. Ed., 649.	
Robbins vs. Taxing District, 120 U. S., 489; 30 L. Ed., 694.	
Leloup vs. Port of Mobile, 127 U. S., 640; 32 L. Ed., 311.	
Asher vs. Texas, 128 U. S., 129; 32 L. Ed., 368.	
Stoutenberg vs. Hennick, 129 U. S., 141; 32 L. Ed., 637.	
Lyng vs. Michigan, 135 U. S., 161; 34 L. Ed., 150.	
(B) All set out of view and consideration by holding of this court in case of Delamater vs. South Dakota	29
(C) Delamater vs. South Dakota analyzed.....	29
8. Richard vs. Mobile analyzed and applied.....	34
9. Stockard vs. Morgan distinguished.....	34
10. Ferry Co. vs. East St. Louis applied.....	35
11. Moran vs. New Orleans distinguished.....	35
12. Gloucester Ferry Co. vs. Pennsylvania distinguished.....	37
13. Covington Bridge Co. vs. Kentucky distinguished.....	38
14. Original viewpoint of case.....	38
(A) The tax is directed at and applied to the business, and not to any particular sale or sales to any person or persons.....	39
(B) The business of a liquor dealer is essentially local in its nature, which is recognized by Federal and State statutes and decisions.....	39
(C) All of the details of this business prior to the delivery of the liquors to the carrier for delivery to the consignee are <i>intra</i> and not inter-state transactions	40
(D) The fact that it was the intention of plaintiff in error to sell liquors in interstate commerce is immaterial	42
15. The act construed.....	44
(A) Code sections 901 and 902 construed <i>in pari materia</i> with said act.....	45
(B) Section 16 of said act construed.....	46
16. Nathan vs. Louisiana construed and applied.....	47
17. State vs. Applegarth construed and applied.....	49
18. Conclusion	51

INDEX.

iii

INDEX OF CASES CITED.

	Page
1. Asher vs. Texas, 128 U. S., 129; 32 L. Ed., 368.....	28
2. Austin vs. Shelton, 122 Tenn., 637.....	21
3. Brennan vs. Titusville, 153 U. S., 289; 38 L. Ed., 649.....	28
4. Coe vs. Errol, 116 U. S., 517; 29 L. Ed., 2017.....	41
5. Covington Bridge Co. vs. Kentucky, 154 U. S., 205; 38 L. Ed., 963	35
6. Crutcher vs. Kentucky, 141 U. S., 47; 31 L. Ed., 649.....	28
7. Delamater vs. South Dakota, 205 U. S., 97; 51 L. Ed., 728..	29
8. Ferry Co. vs. East St. Louis, 107 U. S., 368; 27 L. Ed., 423.	36
9. Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196; 29 L. Ed., 150.....	35
10. Kelly vs. Dwyer, 75 Tenn., 180.....	17
11. Kelly vs. State, 123 Tenn., 550.....	18
12. Kidd vs. Pearson, 128 U. S., 24-25; 32 L. Ed., 351.....	43
13. Ledbetter vs. United States, 120 U. S., 606; 42 L. Ed., 1163.	39
14. Leloup vs. Fort of Mobile, 127 U. S., 640; 32 L. Ed., 311...	28
15. Logan vs. Brown, 125 Tenn., 209.....	21
16. Lyng vs. Michigan, 135 U. S., 161; 34 L. Ed., 150.....	28
17. Moran vs. New Orleans, 112 U. S., 69; 28 L. Ed., 653.....	35
18. Motlow vs. State, 125 Tenn., 528.....	20
19. Nathan vs. Louisiana, 8 How., 80.....	47
20. Pennsylvania Railroad vs. Knight, 192 U. S., 21; 48 L. Ed., 325	41
21. Richard vs. Mobile, 208 U. S., 479; 52 L. Ed., 580.....	34
22. Robbins vs. Taxing District, 120 U. S., 489; 30 L. Ed., 604..	28
23. State vs. Applegarth, 28 L. R. A. (O. S.), 813.....	49
24. State vs. Schlier, 50 Tenn., 281.....	17
25. Stockard vs. Morgan, 135 U. S., 30, 31; 46 L. Ed., 791.....	34
26. Stoutenberg vs. Hennick, 129 U. S., 141; 32 L. Ed., 639....	28



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 122.

SOUTHERN OPERATING COMPANY, PAUL HEY-
MAN, AND H. W. STEINER, PLAINTIFFS IN ERROR,

vs.

W. P. HAYES, COUNTY CLERK OF HAMILTON COUNTY,
TENNESSEE, AND J. PARKS WORLEY, STATE REVENUE
AGENT OF THE STATE OF TENNESSEE, DEFENDANTS IN
ERROR.

BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR,
W. P. HAYES, CLERK, AND J. PARKS WORLEY,
STATE REVENUE AGENT, BY FRANK M. THOMP-
SON, ATTORNEY GENERAL OF TENNESSEE.

I.

Statement of the Case.

May it please the Court: This is a writ of error to the Supreme Court of the State of Tennessee awarded by the Chief Justice thereof, upon the ground that the judgment in the case affirmed and sustained the validity of chapter

479 of the Acts of the General Assembly of said State known as the general revenue bill, which said statute the plaintiffs in error asserted and claimed to be in conflict with article 1, section 8, sub-section 3 of the Constitution of the United States, which is as follows:

"Congress shall have the power to regulate commerce with foreign nations, among the several States and among the Indian tribes."

The case arose upon a bill filed by the plaintiffs in error against the defendants in error as clerk of the County Court of Hamilton County, Tennessee, and State revenue agent of Tennessee, in the chancery court at Chattanooga, for Hamilton County, on the 15th day of January, 1912.

The case is somewhat singular, in that after the original injunction bill was filed on January 15, 1912 (Tr., pp. 2, 3, 4, and 5), and there had been a demurrer and answer thereto (Tr., pp. 8, 9, and 10), the plaintiffs in error were, by order of the court below showing consent of defendants, allowed to substitute an amended or supplemental bill to stand in the room and stead of the original bill as from the time of the filing of the original bill, and by said order it was also provided that the answer which had been filed by the defendants denying all the material averments of the original bill, be withdrawn and stricken from the file, leaving the case pending upon the amended or supplemental bill and the demurrer which had already been filed to the original bill (Tr., p. 11).

Said chapter 479, assailed as being violative of said commerce clause of the Federal Constitution, is to be found in Sheet Acts of the Legislature of Tennessee for said year 1909, and so much of the same as is material to the issues involved is as follows:

"CHAPTER 479.

"AN ACT TO PROVIDE REVENUE FOR THE STATE OF TENNESSEE AND THE COUNTIES AND MUNICIPALITIES THEREOF.

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the taxes on every \$100 worth of property shall be 50 cents for the year 1909, and for every subsequent year thereafter, 35 cents of which shall be for State purposes and 15 cents for school purposes; that there shall be levied and collected a collateral inheritance tax as provided for in chapter 174 of the acts of 1893 and acts amendatory thereof.

"SECTION 2. *Be it further enacted*, That the several county courts of this State be, and they are hereby, authorized and empowered to levy an annual county tax on every \$100 worth of taxable property not exceeding 30 cents upon the \$100 worth of property, and exclusive of the tax for public roads and pikes and schools and interest on county debts and other special purposes; and each county and municipality in this State is hereby authorized and empowered to levy a privilege tax upon merchants and such other vocations, occupations, or businesses as are named in this act and declared to be privileges, not exceeding in amount that levied by the State for State purposes. The imposition of a privilege tax under this act shall not be construed as a release or exemption from an *ad valorem* tax unless otherwise expressly provided; nor shall this act be construed as repealing any special act heretofore passed imposing a privilege tax: *Provided*, That any indigent ex-Confederate or ex-Federal soldier doing a privilege business, with a capital not exceeding \$250, shall be exempt from paying the privilege tax herein provided for.

"SECTION 3. *Be it further enacted*, That all merchants shall pay an *ad valorem* tax upon the average capital invested by them in their business of 50 cents on the \$100, 35 cents of which shall be for State purposes and 15 cents for school purposes; and a privilege tax of 15 cents on each \$100 worth of taxable prop-

erty, $7\frac{1}{2}$ cents of which shall be for school purposes and $7\frac{1}{2}$ cents for State purposes: *Provided*, That such privilege tax, without regard to the length of time they do business, shall in no case be less than \$5. The \$5 paid shall be a credit when the balance of the tax is paid: *Provided, further*, That said \$5 shall be equally divided between the State and counties: *Provided, further*, That when the stock is less than \$800, the privilege shall be fixed at \$7.50 per annum, and that no *ad valorem* shall be taxed.

"SECTION 4. *Be it further enacted*, That each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the county court clerk as provided by law for the collection of revenue.

"Liquor Dealers.

"Wholesale, and, in addition, taxed as other merchants	\$500.00
"Retail, taxed as other merchants, and, in addition, shall pay as follows:	
"In cities, taxing districts, or towns of 6,000 inhabitants or over, each, per annum....	500.00
"At any place, city, taxing district, or town of less than 6,000 inhabitants, each, per annum	500.00
"Persons selling beer or any quantity of liquors on steamboats, flatboats, or any other vessel or water craft or from railroad cars, shall pay a tax, each, in lieu of all other taxes to be paid in any county they may elect, per annum.....	500.00

"Persons selling liquors in quantities of one quart or more, except manufacturers selling to dealers in original packages of not less than five gallons, are wholesale dealers, and persons selling smaller quantities than five gallons are retail dealers; and the tax on liquor dealers applies to all drug stores, except in uses of wine for sacramental purposes and alcohol for domestic purposes. No producer of grape wine,

where they raise and make the wine themselves, shall pay any privilege tax for selling the same.

"*Provided*, They shall not sell in quantities of less than one and a half ($1\frac{1}{2}$) gallons.

"Liquor dealers are defined as every person, company, or firm selling spirituous, vinous, or malt liquors, beer or ale, or intoxicating bitters, or any medicated or adulterated cider, or any social club or association, incorporated or otherwise, which handles such liquors for sale. The procuring of United States revenue license to wholesale or retail liquor dealers shall be taken as *prima facie* evidence that the parties are in the wholesale or retail liquor business, and are subject to State and county taxes, unless established by proof that they are not so engaged. Upon any clerk's receiving knowledge of such internal-revenue license, he shall have a right to collect the taxes by distress warrants.

"*Provided*, That nothing in this act shall authorize or legalize the sale of liquors."

* * * * *

"SECTION 16. *Be it further enacted*, That it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the taxes prescribed for the exercise of the same, and all parties so offending shall be liable to a fine of not less than \$10 nor more than \$50 for each day such privilege is exercised without license; but this inhibition shall not apply to any person, firm, or corporation engaged in interstate commerce."

Pleadings.

The said amended bill contained the following averments:

That on January 1, 1912, complainant, Southern Operating Company, a corporation chartered under the laws of Tennessee, with its office and place of business in Chattanooga, Hamilton County, Tenn., was and since continuously has been and still is engaged in interstate business exclusively; that at said date it lawfully owned and had in

its possession a stock of spirituous liquors; that the laws of Tennessee recently enacted, regulating domestic traffic in intoxicating liquors, are such that complainant cannot profitably conduct that character of business. For this reason it has, since said first day of January, 1912, confined and still confines its operation exclusively to the sale of said liquors to non-residents of the State of Tennessee for shipment out of and beyond the limits of the State of Tennessee and into other States for delivery there, and has not since that day sold, or offered for sale, or handled for sale, nor does it desire or intend to sell or offer for sale any liquors for any purpose within the State of Tennessee; it has resorted to no subterfuge or evasion of the laws of the State of Tennessee, and it has in no way engaged in such domestic traffic.

That the manner in which complainant has conducted its business since January 1, 1912, and still conducts its business, is as follows and not otherwise: Complainant's said stock of liquors is kept in its warehouse at Chattanooga, Tenn. Complainant solicits and receives orders by mail from citizens and residents of other States for shipment and delivery in such other States of said liquors, and complainant neither solicits orders in Tennessee nor solicits nor receives orders for shipments and delivery at any points in Tennessee, nor makes any such shipments or deliveries. Upon receiving orders from citizens and residents of other States for the shipment of liquors from the State of Tennessee into such other and different States and delivery there, complainant manifests its acceptance of such orders by delivery of said liquors from its said place of business at Chattanooga, Tenn., to railroads engaged in interstate traffic for continuous transportation and delivery only to points beyond the State of Tennessee and to said purchasers, which said act of delivery closes the contract of sale, and complainant collects the price of goods sold by checks and money orders mailed to it from said foreign States, either at the

time the order is received or after said liquors are received by said purchasers.

Tr., pp. 12-13.

That complainant has complied with the revenue laws of the United States and the State of Tennessee applicable to it. It has paid the Federal taxes assessed against it as a liquor dealer, and holds Federal license to carry on business as such. It has paid the State, county, and city taxes upon its property and the *ad valorem* tax based upon the value of its stock of goods, commonly known as "merchants' tax," and it is averred that it believes it is subject to no further assessment for taxation. It is averred that it had paid all privilege taxes claimed by the defendants, including the privilege tax provided for in chapter 479, Acts of 1909, up until the said first day of January, 1912.

Tr., p. 13.

Sections 3 and 16 of said chapter 479, above quoted, are then set out in the bill.

Tr., pp. 13-14.

It is then averred that, under other statutory provisions of Tennessee, the county of Hamilton and city of Chattanooga are each authorized to impose privilege taxes on occupation and business taxed by the State as such to an amount not exceeding that prescribed by the State on such business or occupation; that said county and city have under such authority imposed privilege taxes on the business of liquor dealers to the full amount allowed by law; that the county and city have no power to tax a business as a privilege not so taxed by the State.

Tr., p. 14.

It is then averred that said chapter 479, relating to privilege taxes, has no application to plaintiff in error, and that it is not subject to its provisions; that the clear intent,

meaning, and purpose of said statute is to prescribe a privilege tax against persons, firms, and corporations engaged in selling spirituous, vinous, and malt liquors within the State of Tennessee and not against those engaged exclusively in interstate commerce and business; that, as an indication of this legislative intent, section 16 of said act provides that the penalties and inhibitions therein prescribed are not applicable to persons, firms, or corporations engaged in interstate commerce.

It is further averred that if said statute is susceptible to said construction that it imposes a tax upon persons, firms, and corporations engaged like plaintiff in error in interstate commerce exclusively; that when said statute to that extent violates article 1, section 8, subsection 3, of the Constitution of the United States, which is as follows:

"Congress shall have the power to regulate commerce with foreign nations, among the several States and among the Indian tribes."

plaintiff in error pleads and relies upon said provision of the Constitution.

Tr., pp. 14, 15.

It is then averred that the said J. Parks Worley and W. P. Hayes had conceived the idea that, although the plaintiff in error was engaged exclusively in interstate commerce as therein shown, it may be assessed with said wholesale liquor dealers' privilege taxes for the year of 1912 and subjected to the payment thereof; that they have the power and right to assess the plaintiff in error under color of said act, but that same was without warrant or authority of law and in violation of said commerce clause of said Constitution; that unless enjoined they would make said assessment for the said first quarter of the year; that they would likewise make said assessment for the county privilege taxes of a like sum and that distress warrants would issue; that said Worley and Hayes had notified plaintiff in error of their

intention so to proceed. It is then averred that plaintiff in error is in no way subject to said privilege tax, and said threatened acts of defendants are void and illegal, without authority of law, and violative of said commerce clause of the Constitution.

Tr., p. 16.

The sixth paragraph of the bill contains various averments placed therein for the purpose of giving a court of equity jurisdiction and to avoid the force of the statute in Tennessee, which required all taxes to be paid under protest, and granting to the taxpayer a right of action to recover the same back in an action at law and rendering said remedy exclusive of all others.

As no question will be made in this court upon the jurisdiction of the chancery court and the injunctive feature, it is not deemed necessary to set out in detail these averments. The sole question herein argued and insisted upon in this court will be the validity of said statute and the correctness of the decree, and judgment of the Supreme Court of the State so adjudging.

The bill prayed for process that injunction issue restraining said clerk and revenue agent from proceeding to assess and collect said privilege tax under said chapter 479. It further prayed that it be adjudged that the said act does not impose a tax upon the privilege of engaging in interstate business as a dealer in spiritous liquors; the plaintiff in error is engaged exclusively in said business and not subject to said tax, and, in alternative, that if the court should be of opinion that said statute does impose a tax upon said liquor dealers that the same to that extent be declared void and violative of the said commerce clause of said Constitution. It further prayed for general relief.

Tr., p. 18.

The injunction as prayed for was issued.

Demurrer.

On March 22, 1912, defendants filed their demurrer to said original bill, which was later, as hereinbefore shown, ordered to stand, apply to and be treated as having been filed to said amended bill, which demurrer challenged said bill upon three grounds: First. That no injunction would lie to restrain the assessment and collection of the State tax of the kind sought to be enjoined. This ground is not now insisted upon. Second. To so much of the bill as seeks to enjoin the collection of the State and county taxes, upon the ground that plaintiff in error is engaged in and intends to engage in an interstate business; that is to say, sell only to parties outside of the State, for the reason that the privilege tax referred to is imposed by law on the plaintiff in error under the facts stated in the bill, and that this imposition is not a burden on commerce between the States and in conflict with the Federal Constitution. Third. To so much of the bill as seeks to enjoin on the ground that the imposition of said taxes would destroy the business of the plaintiff in error because of the size of the tax as compared with the size of the business done, because this is wholly immaterial.

Tr., pp. 8-9.

Disposition of the Case by the Chancellor.

On July 22, 1912, the case was heard by the chancellor upon the said amended bill and demurrer. The court, being of the opinion that the demurrer was not well founded, overruled the same, to which defendants excepted. The defendants, having heretofore withdrawn their answer in open court, declined to make further defense and elected to reply upon said demurrer so overruled. Thereupon the case was dismissed. The said injunction was rendered perpetual, and the defendants were restrained from levying or collecting said taxes.

It was held by the court that the said act, chapter 479, does not impose a tax upon the privilege of engaging in interstate business; that the plaintiff in error was at the time of the filing of the bill engaged exclusively in said business, and was not, therefore, subject to said tax. It was further held that if the said chapter 479 was susceptible of the construction that it imposed a tax upon the plaintiff in error, that it was to that extent violative of said article 1, section 8, subsection 3, of the Constitution of the United States, known as the "commerce clause."

Defendants in error prayed, obtained, and perfected an appeal to the Supreme Court of the State, which is the highest tribunal of the State.

Trial and Disposition of the Case by the Supreme Court of Tennessee.

At the September term, 1912, of the Supreme Court of Tennessee, the then Attorney General of Tennessee, Chas. T. Cates, Jr., filed five assignments of error to the action of the chancellor hereinbefore stated, the first one of which challenged the jurisdiction of the chancery court to entertain the suit and issue the injunction. This will not be set out, as it is not now relied upon.

The second was as follows:

"Upon the facts stated in the bill showing that the plaintiff in error is a liquor dealer in the city of Chattanooga, Tennessee, where it has its place of business, its large stock of liquors and all the paraphernalia necessary to carry on said business, and where it is engaged in carrying on the business of a liquor dealer through its officers, agents, and employees, the chancellor erred in holding (1) that the act of 1909, chapter 479, in so far as it imposes a tax upon liquor dealers, does not apply to the occupation and business carried on by the plaintiff in error; (2) that if said act be construed to apply to the business of plaintiff in error, as described in the bill, it is in contravention

of the commerce clause of the Federal Constitution and therefore void."

Tr., pp. 44-45.

The third assignment is in this language:

"Upon the facts stated in the bill, the chancellor erred in rendering a decree in favor of the plaintiff in error, enjoining the issuance by the clerk of a distress warrant, and its enforcement for the State and and county tax shown to be due from plaintiff in error to the State and county."

Tr., p. 45.

The fourth assignment is in this language:

"Upon the facts stated in the bill, the chancellor erred in not holding and decreeing that the plaintiff in error is liable to the State of Tennessee for the privilege tax imposed upon liquor dealers by the act of 1909, chapter 479, and in not holding that the plaintiff in error is not such an interstate dealer as is protected by the commerce clause of the Federal Constitution."

Tr., p. 45.

The fifth assignment is: "The chancellor erred in not dismissing plaintiff in error's bill and in rendering judgment against it for the amount of the tax due the State and county, to wit, the sum of \$500 to each.

Tr., p. 45.

Opinion of the Supreme Court.

On December 2, 1912, the Supreme Court of Tennessee handed down an opinion reversing the decree of the chancellor, in which it said:

"We have carefully considered the allegation of complainant's bill, and we see nothing in the case there made to differentiate it from that of *Logan vs. Brown*, decided by this court at its September term,

1911, the opinion being reported in 141 S. W. R., 751, and 125 Tenn., 211. We are entirely satisfied with the conclusions of law reached in that opinion and adhere to them. The cases are so similar that it is not necessary here to state either the facts of this case or the law applicable to them, as held in *Logan vs. Brown*, but a mere reference to the opinion in that case is sufficient for all purposes."

It was in that case held that the privilege tax imposed by the revenue laws of Tennessee upon the business or occupation of a liquor dealer within the State was valid and collectible, notwithstanding the dealer may make sales beyond the limits of the State which were interstate commerce. It is the doing of the business in Tennessee, the following of the occupation of a liquor dealer here, that is taxed, and not the sales made by him in other States.

Tr., p. 64.

Decree of the Supreme Court.

Accordingly a decree was entered in which it was adjudged that the case was governed and controlled by the *Logan vs. Brown* case; that there was error in the decree of the chancellor in not sustaining the demurrer upon the ground that an injunction would not lie to restrain the collection of revenue due the State and in not following and applying to the facts alleged in the bill the principles and holding of this court in said case of *Logan vs. Brown*; that, therefore, the assignments of error filed by the attorney general should have been sustained, that the decree of the chancellor should be reversed. The court then proceeded to sustain the demurrer and dismiss the bill, except in so far as it might be necessary to retain it for the collection of said taxes, and for this purpose remanded the cause to the chancery court of Hamilton County.

Tr., pp. 65-66.

The plaintiff in error then prepared a petition for writ of error, which will be found in the transcript, pages 66, 67, 68, 69, and 70.

On the 9th day of January, 1913, a fiat was issued by Chief Justice John K. Shields, allowing said petition, the writ of error to operate as a supersedeas, and fixed a bond therefor at \$500.00.

Tr., p. 71.

On the 11th of January, 1913, plaintiff in error filed its assignments of error to the action of the Supreme Court in the trial, being eight in number, and found in the transcript, pages 71, 72, and 73, all of which challenges the constitutionality and validity of said chapter 479 of the acts of the Legislature of Tennessee for 1909, in that the same is violative of said commerce clause of the Constitution.

Upon the coming of these assignments of error, the said Chief Justice of the Supreme Court of Tennessee granted a final decree awarding a writ of error, which states that "desiring to give the petitioners an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter:

"It is ordered, That a writ of error be, and is hereby allowed to this court from the Supreme Court of the United States, and upon petitioners executing bond in the sum of \$500.00 that same should operate as a supersedeas."

Tr., pp. 73-74.

The foregoing constitutes a somewhat amended statement of facts and legal questions presented by this record, involving two questions only: (1) Whether said chapter 479, hereinbefore quoted, applies alone to domestic liquor dealers or dealers selling alone to parties within the State of Tennessee, or whether it applies to all liquor dealers, whether engaged in intra or inter state sales. (2) If applicable to liquor dealers engaged in both intra and inter state sales or to

the liquor dealer whose purpose is to sell only in interstate commerce, as claimed and contended and set up by the plaintiffs in error in this bill, then is the same in conflict with and violative of said commerce clause of the Federal Constitution?

II.

Other Constitutional Provisions and Statutes which are to be Considered in Pari Materia with said Chapter 479, Acts of 1909.

Constitution of Tennessee.

Article one, section 28 of the Constitution of Tennessee is as follows:

"All property real, personal, or mixed, shall be taxed, but the legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary, or educational, and shall except one thousand dollars' worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such a manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value, but the legislature shall have the power to tax merchants, peddlers, and privileges in such manner as they may from time to time direct. The portion of a merchant's capital used in the purchase of merchandise sold by him to non-residents and sent beyond the State, shall not be taxed at a rate higher than the *ad valorem* tax on property. The legislature shall have power to levy a tax upon incomes derived from stocks and bonds that are not

taxed *ad valorem*. All male citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State."

Statutes.

Section 991 of Shannon's Code provides:

"The right to sell spirituous, vinous, or fermented liquors is a taxable privilege in the sense of the twenty-eighth section of the second article of the Constitution."

Section 992 provides:

"This privilege shall not be exercised by any person without license from the clerk of the county court."

Section 993 provides:

"The license may be granted to a person competent to take the same, upon the following condition: (1) That the applicant deliver to the clerk a sworn statement of the value of the liquors about to be offered for sale at the establishment for which he demands a license."

Section 994 says:

"It shall not be lawful for any person or persons to sell, or offer to sell, any spirituous or alcoholic liquors within this State until he, she, or they, shall first appear before the county court clerk of the county where such liquors are to be sold or offered for sale, and take and subscribe to an oath not to mix or adulterate with any substance whatever, the liquors offered for sale, and to give bond in the sum of five hundred dollars, with good and sufficient security, for the payment of all costs arising from prosecution for violation of provisions herein."

The foregoing acts were passed in 1859-60 and 1881, and are not repealed by said chapter 479, because the same expressly provides against their repeal on its face.

In construing this constitutional provision and these acts, the Supreme Court of Tennessee has held that the merchants' tax mentioned in said constitutional provision is entirely distinct and separate from the privilege tax mentioned therein and provided for as to liquor dealers under said section 991 of the code.

Kelly vs. Dwyer, 75 Tenn., 180.

In dealing with said constitutional provision and these statutes, the Supreme Court of Tennessee has said:

"That the exercise of an occupation or business which requires a license from some proper authority, designated by a general law, and not open to all or any one without such license, is a privilege within the meaning of the Constitution."

State vs. Schlier, 50 Tenn., 281.

The Supreme Court of Tennessee has held that the holder of such a license cannot sell liquor—that is, carry on the business of a liquor dealer—at any other place than the building and establishment named in the license.

State vs. Butler, 1 Shannon's Cases, 91.

Four-Mile Law.

Chapter 1 of the acts of 1909, commonly known as the Four-mile Law, is as follows:

"An act to prohibit the sale of intoxicating liquors as a beverage near any schoolhouse, public or private, where a school is kept, whether the school be in session or not."

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That it shall not hereafter be lawful for any person to sell or tipples any intoxi-

cating liquors, including wine, ale, and beer, as a beverage, within four miles of any schoolhouse, public or private, where a school is kept, whether the school be then in session or not, in this State, and that any one violating the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine for each offense of not less than fifty dollars nor more than five hundred dollars and imprisonment for a period of not less than thirty days nor more than six months.

"SECTION 2. *Be it further enacted.* That the grand juries shall have and exercise inquisitorial power in respect to violations of this act; and it shall be the duty of the circuit and criminal judges of the State to give the same in charge to them.

"SECTION 3. *Be it further enacted.* That all laws in conflict with this act be, and the same are hereby, repealed.

"SECTION 4. *Be it further enacted.* That this act take effect from and after July 1, 1909, the public welfare requiring it."

The Supreme Court of Tennessee, in construing this act, held that it forbids all beverages sales of intoxicating liquors in this State, and, in fact, all sales except those made by druggists upon the prescription of a physician, and sales for mechanical, medicinal, sacramental, chemical, scientific, and like purposes, which were declared to be non-beverage sales.

Kelly *vs.* State, 15 Cates, 123 Tenn., 550.

In dealing with this act, this same court announced the following propositions: (1) That it is the general rule with regard to the sales of personal property that it is complete and the title passes as soon as the parties have agreed upon the terms, and that delivery is not essential to the passing of title; (2) that when such goods are ordered through the mail it is necessary that the assent of the person from whom the order is made shall be communicated to the person making the order, but that this assent may be accomplished by filing the order and delivering the goods to a common car-

rier to be transported to the person making the order; (3) that when a commodity has been delivered to a common carrier to be transported on a continuous voyage or trip beyond the limits of the State where delivered, the character of interstate or foreign commerce attaches; (4) that the Wilson act, which provides that all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory, or remaining for use, consumption, sale, or storage therein, shall, upon arrival in such State or Territory, be subject to the protection and effect of the laws of such State or Territory enacted in the exercise of its police power, to the same extent and in the same manner as if such liquids and liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise, has reference only to intoxicating liquors brought into the State, and does not relate to and control such liquors when sent out of the State; (5) it was therefore held that where liquors were stored in Tennessee and sold upon such mail order to pass outside of the State by delivery to a common carrier that said act was not thereby violated.

State *vs.* Kelly, 123 Tenn., 563-4-5-8.

Manufacturers' Bill.

Chapter 10 of the Acts of 1909 is as follows:

"An act to prohibit the manufacture in this State of intoxicating liquors for the purpose of sale.

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That it shall not hereafter be lawful for any person or persons to manufacture in this State, for the purposes of sale, any intoxicating liquor, including all vinous, spirituous, or malt liquors, and that any one violating the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine, for each offense, of not less than \$250 nor more than \$1,000,

and imprisonment for a period of not less than ninety days nor more than twelve months: *Provided*, This section shall not be construed as to prohibit the manufacture of alcohol of not less than 188 proof for chemical, pharmaceutical, medical, and bacteriological purposes.

"SECTION 2. *Be it further enacted*, That the grand juries of this State shall have and exercise inquisitorial power in respect to violation of this act, and it shall be the duty of the circuit and criminal judges of the State to give the same in charge to them.

"SECTION 3. *Be it further enacted*, That all laws in conflict with this act be, and the same are, hereby repealed.

"SECTION 4. *Be it further enacted*, That this act shall take effect from and after January 1, 1910, the public welfare requiring it."

It was held that this act was within the valid and constitutional police powers of the State of Tennessee, and that its passage and enforcement was therefore violative of no clause of either the State or Federal constitutions.

Motlow vs. The State, 17 Cates, 125 Tenn., 548.

Chapter 479 of the Acts of 1909.

This said chapter and the particular sections and provisions now under review have been construed and passed upon by the Supreme Court of Tennessee in two notable cases. In the first case the act was sought to be applied to a dealer of soft drinks, which were not, in point of fact, intoxicating, that is, drinks which did not contain a sufficient quantity of alcohol to intoxicate. The court sustained the validity of the act, but held it did not apply to said dealers in "soft" drinks. The court furthermore held in this case that this act was passed to aid in the enforcement of the Four-mile Law, above quoted, and as construed by it; that it was not only a revenue measure, but it was, at the same time, a police regulation and measure resorted to by the State to aid in the

enforcement of its liquor laws, one of which was the said Four-mile Law.

Austin vs. Shelton, 122 Tenn., 637:

In the second of these cases a liquor dealer at Jellico, in the State of Tennessee, who, as does plaintiff in error in this case, claimed to be an interstate dealer exclusively, sought to avoid the payment of the taxes prescribed by this act, first, upon the ground that it did not apply to him as an interstate dealer in liquors, and, second, if it did, that it was violative of the said commerce clause of the Constitution.

Logan vs. Brown, 125 Tenn., 209:

This case will be dealt with hereinafter more in detail.

From the foregoing it will be seen that the following conditions exist in Tennessee with respect to the liquor traffic:

(1.) That intoxicating liquors cannot be manufactured in this State;

(2.) That intoxicating liquors cannot be sold within four miles of a school-house, which covers the entire territory of Tennessee; that under this last-mentioned act there can be no legal sale of intoxicating liquors within the State of Tennessee and to her citizens except those made by druggists upon the prescription of a physician and sales made for mechanical, medicinal, sacramental, chemical, and scientific purposes, or sales made to persons outside of the State upon mail orders, the acceptance of which are manifested by the delivery of the liquors to an interstate carrier for continuous transportation out of the State, as defined in the said Kelly case hereinbefore quoted and set out;

(3.) That in addition to the penalties prescribed by the Four-mile Law and other laws this State, as one of its police regulations as well as for revenue purposes, passed said chapter 479 of the Acts of 1909; that the same has been maintained by the Supreme Court of the State in its appli-

cation to intrastate liquor dealers who sell liquors which are, in point of fact, intoxicating, and that it also applies to interstate liquor dealers, such as plaintiff in error represents itself to be in this record, and that in its application to such dealers the same is not violative of the commerce clause of the Federal Constitution.

III.

Logan vs. Brown Case Analyzed.

In view of the fact that this cause was instituted for the manifest purpose of having reviewed and overruled the opinion and decision of the Supreme Court of Tennessee in the case of *Logan vs. Brown*, it would be well to examine said case, showing the identity of the facts therein to the facts of the instant case, and then the reasoning of the court for its conclusion that said act applies to such interstate dealers, and that it is not in conflict with the commerce clause of the Constitution, and does not impose a burden upon interstate commerce within the construction and rulings of this court.

(1.) Logan was a citizen and resident of Tennessee, as is plaintiff in error. Like plaintiff in error, he was a wholesale liquor dealer engaged in the sale of liquors to citizens and residents in other States than the State of Tennessee. He owned and operated a storehouse and place of business at Jellico, Tennessee, just as plaintiff in error owned and operated a storehouse at Chattanooga, Tennessee. He purchased his liquors in other States, paid for them by checks mailed by him in the post-office. The liquors were delivered outside of the State to common carriers, who carried them to his place of business and delivered them to him at Jellico. This is the same procedure pursued by plaintiff in error. He made all sales by means of mail orders received by him at his post-office in Tennessee. These mail orders were accompanied by checks. Logan made no sales to parties in Tennessee. The packages received by him were stored in

his storehouse and there broken up when the liquors were sold on said mail orders. The goods were sold by him by placing them in charge of a common carrier for transportation outside of the State. It will be seen that his method of transacting business was identical to that of plaintiff in error (*Logan vs. Brown*, 125 Tenn., 212-213). He resisted the collection of the taxes, paid same under protest, and brought suit to recover the amount thereof back. He, like plaintiff in error, had paid the United States revenue license. His licenses showed upon their face that he applied for the same for the sole purpose of doing an interstate business. The facts, then, in this Logan case and the manner in which he conducted his business are identical with the scheme and manner of business conducted by plaintiff in error, as detailed in this bill.

(2.) The court rested its conclusion that this tax applied to Logan, and that the statute was not obnoxious to the Federal Constitution, upon four grounds: First. It held that he was a wholesale liquor dealer, and that the act applied to him unless he was relieved therefrom by reason of the fact that he was making sales alone to persons outside of the State. Upon this point the court, after quoting and setting out the Wilson act, held that the circumstance that he purchased his stock without the State had no weight in the case. It held that it made no difference whether he purchased his goods outside of the State or procured them within the State. The court then said on this first proposition:

"The stock of goods which he has in his storehouse is certainly not exempt from the State taxation. Even though he imports it for the express purpose of reshipping or distributing all of it to parties outside of the State, still it has 'come to rest' within the limits of the State and is, therefore, subject to taxation."

American Steel Wire Co. vs. Speed, 176 U. S., 500; 24 Sup. Ct., 365; 48 L. Ed., 538.
General Oil Co. vs. Crain, 209 U. S., 211; 28 Sup. Ct., 475; 53 L. Ed., 745.

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It is submitted that these cases cited, and others which might be cited, support the propositions laid down by the court, that this property when it reached the storehouse and was delivered to plaintiff in error, there ceased to be in transit; that it was "at rest" in Tennessee and subject and amenable to the laws of the State.

(2.) The court then held that Logan was not protected by the commerce clause of the Federal Constitution, because the liquor traffic is a well-recognized subject of police regulation. The exaction of a license fee from a liquor dealer is an ordinary exercise of police power. The court said:

"The mere levy of an occupation tax upon a liquor dealer and resident of Tennessee, with his house and business establishment in Tennessee, even though he ships his sales to other States, cannot be held to be a regulation of commerce between the States. Certainly it is no more a regulation of commerce than the imposition of a tax upon the owners of ferries, whose boats ply between landings in different States. The power of the State so to tax ferries was upheld in *Ferry Co. vs. East St. Louis*, 107 U. S., 365; 2 Sup. Ct., 257; 27 L. Ed., 419."

A license was required in that case by the city of East St. Louis, and the court said:

"The exaction of a license fee is an ordinary exercise of police power by municipal corporations. When, therefore, a State expressly grants to an incorporated city, as in this case, the power to license, tax, and regulate ferries, the latter may impose a license tax on the keepers of ferries, although the boats ply between landings lying in two different States, and the act by which this exaction is authorized will not be held to be a regulation of commerce. *Ferry Co. vs. East St. Louis*, *supra*; *Fanning vs. Gregoire*, 16 How., 534; 14 L. Ed., 1043; *Conway vs. Taylor*, 1 Black, 603; 17 L. Ed., 191."

Logan vs. Brown, 125 Tenn., 216.

(3.) As another reason for holding that he was not protected by the commerce clause, the court called attention to the statement of facts so peculiarly worded, in that he "makes all sales;" that payments "are" made to him, and that "the goods are stored" by him. The court then said:

"If we concede, however, that it is intended to be said that complainant has never made sales to parties within the State, still there is no guaranty that he will continue so to exclude such parties from buying hereafter. He has his house in Tennessee, his liquors in Tennessee, his equipment and location, and is prepared to make sales in Tennessee. He is entitled, under the law, to sell his liquor for medicinal, mechanical, scientific, culinary, and all other purposes, save for beverage purposes alone. *Kelly vs. State*, 123 Tenn., 516; 132 S. W., 193.

"Looking to the organization and equipment of complainant's business, it must be conceded that he is engaged in the general occupation of a liquor dealer in Tennessee. Such occupation is declared a privilege and a tax is demanded by the State for its pursuit. The fact that particular sales so far made by him have been to non-residents does not relieve his business of the privilege tax by reason of any provision of the Federal Constitution. This conclusion seems to be fully warranted from the case of *Ficklen vs. Taxing District*, 145 U. S., 1; 12 Sup. Ct., 810; 36 L. Ed., 601."

Logan vs. Brown, 125 Tenn., 217.

The court then quotes at length from this last-mentioned case and on page 219 says:

"While it is true, at the conclusion of this opinion, the following language is used:

" 'What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no license therefor, but had simply transacted business for non-resident principals, is an entirely different question.' While it is true this language is used, it has no application here, for this complainant is no broker or agent, doing

business for non-resident principals. He is a resident of Tennessee, doing business for himself in Tennessee. This circumstance that he has failed to apply for license to engage in the occupation of a liquor dealer does not determine the question whether or not he is engaged in such general occupation. We think he is so engaged, and is accordingly liable for the tax, although his sales, so far, have been to purchasers without the State."

Logan vs. Brown, 125 Tenn., 219.

(4.) The court then said that this tax imposed by this act has reference to the business within the State and that it interposes no obstacle to the shipments and sales out of the State. It further says that he has his place of business in Tennessee where he gathers his stock of goods. Here he receives his purchases, breaks bulk, assorts his stock, and here in Tennessee keeps it; that he gets his orders, prepares his shipments, delivers to the carriers, and receives his remittances in Tennessee. That, in fact, every detail of his business is within and under the protection of the State of Tennessee, except that he makes his sales to parties without the State, and purchases his stock from outside the State, which latter incident has no bearing on the controversy by reason of the provisions of the Wilson act heretofore mentioned. After reciting the foregoing facts the court says:

"We are of opinion that the State has a right to declare the doing of these things within her borders a privilege, and to tax such privileges accordingly."

The court then further says:

"The State may tax a business or occupation, and the fact that the stock of a particular dealer engaged in such business or occupation, happens to have been bought and brought in from some other State will not relieve him of the tax. *Woodruff vs. Parham*, 8 Wall., 123; 19 L. Ed., 382; *Brown vs. Houston*, 114 U. S., 622; 5 Sup. Ct., 1091; 29 L. Ed., 257."

Logan vs. Brown, 125 Tenn., 220.

The court then further says:

"If a dealer, engaged in a particular business, may be required to pay a tax levied upon that business, even though he purchases all his goods without the State, we can perceive no reason why a dealer, engaged in a particular business, may not be required to pay a tax levied upon that business, even though he sells all his goods without the State. The tax is no more a burden on commerce in the one instance than in the other. It is not exacted of the interstate traffic in either case, but of the business in both cases.

"Upon this question, the somewhat recent holding of the Supreme Court, in *Cargill vs. Minnesota*, 180 U. S., 452; 21 Sup. Ct., 423; 45 L. Ed., 619, seems determinative."

Logan vs. Brown, 125 Tenn., 220-221.

The court then, after showing that the State of Minnesota had passed an act regulating the business of grain elevators, requiring all persons to obtain a license for the operation of elevators, and for which it charged a fee, and, after showing that in the particular case that considerable grain was purchased in the State but that the entire sales of all the elevators in question were to non-residents of the State and that all the grain was sold and shipped to parties outside the State, and, after showing that the contention was made that the license required in view of the character of business done was in violation of the commerce clause of the Constitution, then quotes in answer thereto from this court, the following language:

"It is also contended that the requirement of a license from the defendant company is inconsistent with the power of Congress to regulate commerce among the States. This view cannot be accepted. The statute puts no obstacle in the way of the purchase, by the defendant company, of grain in the State, or the shipments out of the State of such grain as is purchased. The license has reference only to the business of the defendant at its elevator and warehouse. The statute only requires a license in

respect to business conducted at an established warehouse in the State, between the defendant and the sellers of the grain. We do not perceive that, in so doing, the State has intrenched upon the domain of Federal authority, or regulated, or sought to regulate, commerce. In no real or substantial sense is such commerce obstructed by the requirement of a license."

Logan vs. Brown, 125 Tenn., 221-222.

It is submitted, therefore, that the reasoning of the Supreme Court of Tennessee upon all four of these propositions, as hereinbefore given in its own language, is sound. It is further submitted that this reasoning is fully supported by the decisions of this court relied upon and cited by said court. It would seem, therefore, that further discussion is unnecessary. However, as the briefs of both parties in the Supreme Court of the State were printed in the record in this case, and as plaintiff in error has dealt with certain decisions of this court, we will hereinafter notice the same and disclose that, under a more recent decision of this court, they have no application to the instant case and afforded to plaintiff in error no relief.

IV.

Plaintiff in Error's Cases Distinguished.

The cases relied upon by the plaintiff in error in said briefs are as follows:

Brennan vs. Titusville, 153 U. S., 289; 38 L. Ed., 720.

Crutcher vs. Kentucky, 141 U. S., 47; 31 L. Ed., 649.

Robbins vs. Taxing District, 120 U. S., 489; 30 L. Ed., 694.

Leloup vs. Port of Mobile, 127 U. S., 640; 32 L. Ed., 311.

Asher vs. Texas, 128 U. S., 129; 32 L. Ed., 368.

Stoutenberg vs. Hennick, 129 U. S., 141; 32 L. Ed., 637.

Lyng vs. Michigan, 135 U. S., 161; 34 L. Ed., 150.

Each and all of these cases were strenuously relied upon by plaintiff in error. This court, however, in a more recent case, in dealing with these particular cases, as well as others of like import, in a case wherein it was sought to have a privilege tax assessed by the State of South Dakota upon parties taking orders therein for the sale and delivery of liquors from Minnesota, said:

"All the assignments of error involve the proposition that the State statute, as construed and applied by the court below, is repugnant to the commerce clause of the Constitution. It is manifest, as the subject dealt with is intoxicating liquors, that the decision of the cause does not require us to determine whether the restraints which the statute imposes would be a direct burden on interstate commerce if generally applied to subjects of such commerce, but only to decide whether such restraints are a direct burden on interstate commerce in intoxicating liquors as regulated by Congress in the act commonly known as the Wilson act. 26 Stat. at L., 313, ch. 728; U. S. Comp. Stat., 1901, p. 3177. For this reason we at once put out of view decisions of this court, which are referred to in argument and which are noted in the margin, because they concerned only the power of a State to deal with articles of interstate commerce other than intoxicating liquors, or which, if concerning intoxicating liquors, related to controversies originating before the enactment of the Wilson law."

Delamater vs. South Dakota, 205 U. S., 97;
51 L. Ed., 728.

The cases thus put aside by this court and noted in the margin include each and all of the cases hereinbefore cited as being relied upon and used by plaintiff in error in its brief before the Supreme Court of Tennessee.

In this *Delamater* case this court said:

"The general power of the States to control and regulate the business of dealing in or soliciting proposals within their borders for the purchase of intoxicating liquors is beyond question. With

the existence of this general power we are not, therefore, concerned. We are hence called upon only to consider whether the general power of the State to control and regulate the liquor traffic and the business of dealing or soliciting proposals for the dealing in the same within the State was inoperative as to the particular dealings here in question, because they were interstate commerce and, therefore, could not be subjected to the sway of the State statute without causing that statute to be repugnant to the commerce clause of the Constitution of the United States."

Delamater vs. South Dakota, 205 U. S., 98; 51 L. Ed., 728.

After quoting the Wilson act, the opinion continues:

"It is settled by a line of decisions of this court, noted in the margin, that the purpose of the Wilson act as a regulation by Congress of interstate commerce was to allow the State, as to intoxicating liquors when the subject of such commerce, to exert ampler power than could have been exercised before the enactment of the statute. In other words, that Congress, sedulous to prevent its exclusive right to regulate commerce from interfering with the power of the State over intoxicating liquors by the Wilson act adopted a special rule, enabling the States to extend their authority as to such liquors shipped from other States before it became commingled with the mass of other property in the State by a sale in the original package."

Delamater vs. South Dakota, 205 U. S., 98-99; 51 L. Ed., 728-729.

It was because of this special rule that this court set aside and refused to consider the Robbins and other cases relied upon in that case. For the same reason and because of this special rule with respect to the liquor traffic, this Robbins and other cases do not apply to the instant case.

Stating the issues, this court said:

"The proposition relied upon, therefore, when considered in the light of the Wilson act, reduces itself

to this: Albeit the State of South Dakota had power within its territory to prevent the sale of intoxicating liquors even when shipped into that State from other States, yet South Dakota was wanting in authority to prevent or regulate the carrying on within its borders of the business of soliciting proposals for the purchase of liquors, because the proposals were to be consummated outside of the State, and the liquors to which they related were also outside the State. This, however, but comes to this: That the power existed to prevent sales of liquor, even when brought in from without the State, and yet there was no authority to prevent or regulate the carrying on of the accessory business of soliciting orders within the State. Aside, however, from the anomalous situation to which the proposition thus conduces, we think to maintain it would be repugnant to the plain spirit of the Wilson act. That act, as we have seen, manifested the conviction of Congress that control by the States over the traffic of dealing in liquors within their borders was of such importance that it was wise to adopt a special regulation of interstate commerce on the subject. When, then, for the carrying out of this purpose, the regulation expressly provides that intoxicating liquors coming into a State should be as completely under the control of a State as if the liquor had been manufactured therein, it would be, we think, a disregard of the purposes of Congress to hold that the owner of intoxicating liquors in one State can, by virtue of the commerce clause, go himself or send his agent into such other State, there, in defiance of the law of the State, to carry on the business of soliciting proposals for the purchase of intoxicating liquors."

Delamater vs. South Dakota, 205 U. S., 99;
51 L. Ed., 729.

The court then says:

"The proposition here relied upon is widely different, since it is that, despite the Wilson act, the State of South Dakota was without power to regulate or control the business carried on in South Dakota of soliciting proposals for the purchase of

liquors, because the proposals related to liquor situated in another State. But the business of soliciting business in South Dakota was one which that State had a right to regulate, wholly irrespective of when or where it was contemplated the proposals would be accepted or when the liquor which they embraced was to be shipped."

The court further said:

"But, as by the Wilson act, the power of South Dakota attached to intoxicating liquors when shipped into that State from another State, after delivery, but before the sale in the original package, so as to authorize South Dakota to regulate or forbid such sale, it follows that the regulation by South Dakota of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, even though such liquors were situated in other States, cannot be held to be repugnant to the commerce clause of the Constitution, because directly or indirectly burdening the right to sell in South Dakota—a right which, by virtue of the Wilson act, did not exist."

Delamater vs. South Dakota, 205 U. S., 100-101; 51 L. Ed., 729-730.

The foregoing excerpts from the opinion of this court demonstrated these propositions: (1) That under the special rule established by Congress applicable to intoxicating liquors the laws of Tennessee attached to the liquors of the plaintiff in error upon their delivery in its warehouse at Chattanooga in the original package and before the same was broken up or sold; (2) that the business of selling liquors in Tennessee was one which the State had the right either to regulate or tax, wholly irrespective of when or where said liquors were bought, or to be sold or were to be shipped; (3) that, as by the Wilson act the power and authority of Tennessee and her laws attach to these liquors when they were shipped into the State from the other States after the delivery but before the sale in original packages, so as to authorize Ten-

nessee to regulate and tax such sales, it follows that the regulation and taxation by Tennessee under said act cannot be held to be repugnant to the commerce clause of the Constitution, because directly or indirectly burdening the right to sell in Tennessee, a right which, by virtue of the Wilson act, does not exist in plaintiff in error.

It is insisted on behalf of these defendants in error that these propositions are warranted by the reasoning and language of this court in this Delamater case.

In another case this court said:

"The plaintiff in error asserts that a license tax, such as is provided in this ordinance, is a tax upon the seller of the goods under the license, and therefore a tax upon the goods themselves, and, as they were brought into the State from another State, they cannot be taxed in their original packages, even under the Wilson act. The ordinance, it is said, is in the nature of a revenue act, and was not enacted in the exercise of the police powers of the State through the city. * * * It is insisted that Congress, by the passage of the Wilson act, merely removed the impediment to the States reaching the interstate liquor through the police power, and that it intended to, and did, keep in existence any other impediment to State interference with interstate commerce in original packages.

"But we are of opinion that this section of the ordinance was clearly an exercise of the police power of the State, and, as such, authorized by the act of Congress. The fact that the city derives more or less revenue from the ordinance in question does not tend to prove that this section was not adopted in the exercise of the police power, even though it might also be an exercise of the power to tax. * * * The sale of liquors is confessedly a subject of police regulation. Such sales may be absolutely prohibited, or the business may be controlled and regulated by the imposition of license taxes, by which those only who obtain licenses are permitted to engage in it. Taxation is frequently the very best and most practical means of regulating this kind of business. * * *

"This license tax is exacted without reference to the question as to where the beer was manufactured, whether within or without the State, and hence there is no discrimination in the case."

Richard *vs.* Mobile, 208 U. S., 479-480; 52 L. Ed., 580-581.

As has been stated heretofore, this tax, under this Tennessee statute, is upon the vocation or business of the liquor dealer. As has heretofore been shown this statute is not only an exercise of the taxing power of the State, but it is also an exercise of the police power of the State adopted as one of the methods of regulating the sales of liquors within the State. This last proposition was expressly asserted by the Supreme Court of the State in the case of Shelton *vs.* Austin, *supra*. The State of Tennessee, recognizing its right either to regulate or prohibit the sale of intoxicating liquors within its borders, after prohibiting all beverage sales to its own people, then, as a still further police regulation, levied this tax or license, which is so levied without any reference whatever to the question as to where the liquors are to be sold, whether in or out of the State or whether to citizens of the State or non-residents.

V.

Stockard vs. Morgan, 185 U. S., 30-31; 46 L. Ed., 791.

Plaintiff in error places much reliance upon this case. Stockard and others were residents of Hamilton County, Tennessee, and had been carrying on business in Chattanooga from 1897 to 1900; they as representatives of non-resident parties, firms and corporations, solicited orders for goods from jobbers and wholesale dealers in Chattanooga and, when such orders were obtained, sent them to their non-resident principals. If the orders were received the goods were shipped by the non-resident principals to the local

jobbers. A privilege tax was placed upon this business and exacted of Stockard and others.

The foregoing statement of facts and the reasoning of this court thereon discloses that while the same is sound under the general rule regulating articles of interstate commerce and the business of selling and buying articles in interstate commerce generally, yet it further discloses that if the articles which these agents were taking orders for had been intoxicating liquors and subject, therefore, to the laws of the State of Tennessee upon delivery and before sale in the original package, that then the conclusion of the court would have been just as it was in the Delamater case—exactly the reverse of what it was in the Stockard case.

In other words, the goods being sold were not subject to a special rule fixed by Congress as is intoxicating liquors. The business, therefore, of soliciting orders for the sale of these goods in Tennessee was likewise not subject to this special rule.

This case is mentioned because of the reliance placed upon it in the Supreme Court of Tennessee, and because further it is not one of the cases set aside by this court as not being applicable in the Delamater case, although it is included in the general statement of "others of like import."

VI.

Moran vs. New Orleans, 112 U. S., 69; 28 L. Ed., 653.

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196; 29 L. Ed., 159.

Covington Bridge Co. vs. Kentucky, 154 U. S., 205; 38 L. Ed., 963.

It is insisted by plaintiff in error that the tax sustained by this court in the case of *Wiggins vs. Ferry Co.*, *supra*, was a property tax, and it took certain language from the opinion of the court to sustain the same. This court in that

case, after stating the issues to be, first, that it was contended that the act was a regulation of commerce between the States and void, and, second, void because it imposed a duty on tonnage forbidden by the Constitution, then uses this language:

"In our opinion, neither of these contentions is well founded. The levying of a tax upon vessels or other water craft, or the exaction of a license fee by the State within which the property subject to the exaction has its *situs*, is not a regulation of commerce within the meaning of the Constitution of the United States."

Then, coming to the second proposition, the court said:

"It is next insisted by plaintiff in error that the license fee is a tonnage tax, which the States are forbidden to levy without the consent of Congress. The contention has no ground to rest on. In the first place, the license fee is levied, not on the ferryboat, but on the ferrykeeper. The first section of the ordinance declares that no person shall carry on any trade, business, calling, or profession, without first having obtained a license therefor."

Ferry Co. *vs.* East St. Louis, 107 U. S., 368;
27 L. Ed., 423.

It is next insisted that the case of *Moran vs. New Orleans*, *supra*, militates against the holding in the *Wiggins* case. In the *Wiggins* case the question, as we understand it, was the right of the State to license a business or vocation, the *situs* of which was within its borders, even though that business be the operation of a ferry and boats plying between two States, and this right was sustained. In the *Moran* case was involved the right of the city of New Orleans to impose an additional exaction in the way of a tax upon boats plying the waters of the Mississippi River and the Gulf of Mexico, which had been duly licensed under the act of Congress. This court held that such license fee was a charge explicitly made as the price of the privilege of navigating the Missis-

issippi River between New Orleans and the Gulf of Mexico in the coastwise trade as the condition on which the State of Louisiana consents that the boats of the plaintiff in error might be used. This court held, "The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to use these particular vessels in the coasting trade," but, of course, it properly held that this was a burden upon interstate commerce.

But even then this court said that if the tax sought to be imposed had been a tax upon the income derived from the business of the owners of the boats used in plying the waters of the Mississippi River and the Gulf of Mexico that it might have been sustained. That is, there is a clear intimation by this court that, under those conditions, such a tax would not have been imposed upon commerce. This case, it is submitted, has no application to the instant case.

Gloucester Ferry Co. Case.

The facts in the Gloucester Ferry Company case were these. The Ferry Company was a New Jersey corporation, with its principal office and place of business at Gloucester, where it owned real estate, docks, etc., and its steamboats were registered by Federal license at the port of Camden, in the State of New Jersey. Its business consisted of ferrying freight and passengers from Gloucester to Philadelphia. It owned no property whatever in the city of Philadelphia, but held a lease upon a dock in Philadelphia, upon which it unloaded its freight and passengers, and its boats were only allowed to remain in the State of Pennsylvania as long as was necessary to receive freight and passengers.

The State of Pennsylvania attempted to levy a tax upon the capital stock of the New Jersey corporation, that is, the Ferry Company, and the lower court repelled the effort of the State upon the ground that there was no business carried on by the company in Pennsylvania other than the landing and receiving of freight and passengers, which

is a part of the commerce of the country. The act and tax thereunder was sustained by the Supreme Court of the State, but was reversed by this court. The proposition decided was that under the facts and circumstances above stated the capital stock of the New Jersey corporation was not taxable in Pennsylvania simply because it landed passengers and freight at a leased dock in said State. It is submitted that this case has no application to the instant case.

Covington Bridge Co. Case.

In the *Covington Bridge Co. vs. Kentucky*, the State of Kentucky had sought to fix tolls for transporting articles from Kentucky into Ohio over a bridge. These tolls were by the act placed upon all transportations from Kentucky into Ohio or from Ohio into Kentucky. Neither the approval nor concurrence of Congress or the State of Ohio was sought. The State of Kentucky simply undertook to arbitrarily fix the amount of these tolls for the transmission of articles to and from the States of Ohio and Kentucky and from the States of Kentucky and Ohio. This, of course, was a direct regulation of interstate commerce, and has no application to the instant case. It is submitted that neither of these three cases has the slightest application whatever to the case at hand.

VII.

Original View Point of Case.

But independent of the decision of the Supreme Court of Tennessee in the *Logan vs. Brown* case and without regard to the reasoning of this court in the cases heretofore cited, let us examine the case and the principles controlling it from an independent and original viewpoint. In doing so, the following propositions are submitted to the consideration of this court:

(1.) The tax imposed by this chapter 479, above quoted, is not imposed upon or directed at any sale or sales to any person or persons in either Tennessee or any other State or States; it is not assessed or levied because of such sale or sales, but it is imposed upon the business or occupation of a wholesale liquor dealer carried on and conducted by the plaintiff in error; that is, it is imposed upon the general business of the plaintiff in error in which he holds himself out to the public as a wholesale liquor dealer. The act is not directed to any particular class of dealers, or to any dealer who sells alone to the citizens of Tennessee, or sells exclusively to non-residents of Tennessee. The act is directed to the business conducted by any and everybody of selling intoxicating liquors at wholesale within the State of Tennessee.

Logan vs. Brown, 125 Tenn., 211.

Ledbetter vs. United States, 170 U. S., 609; 42 L. Ed., 1163.

(2.) Both under the Federal statute and under this statute in question the business of a liquor dealer is essentially local. Thus the Federal Government (Revised Statutes, section 3239) requires every person engaged in any business, avocation, or employment, liable to a special tax—such as a liquor dealer—to post and keep conspicuously in his establishment or place of business all stamps denoting the payment of said special tax, etc., and the payment of such tax does not authorize a sale of liquor by the holder of the stamp at any other place than that named in the application, and where the same is to be kept posted.

Therefore, to apply the Federal rule to the instant case, the plaintiff in error would be authorized to sell, under the Federal license held by it, only at the place where its license or stamp is posted, and if it made sales elsewhere, even at the depot of a common carrier or from the house of a railroad where it is claimed by the bill that the sales are consummated, it would be in violation of this Federal statute.

There is no such thing known to the Federal law as a license or stamp tax upon an interstate dealer.

While the amount of the privilege tax imposed upon wholesale liquor dealers is found in said chapter 479, which is the general revenue law of the State, nevertheless, we have heretofore shown that this tax is the exercise of a police power. It is further shown that half a century or more ago, at least in 1859-60, that the right to sell intoxicating liquors and the right to carry on the business of a dealer in intoxicating liquors was made a privilege to be exercised only after a license therefor had been issued by the county court clerk of the county wherein the business was to be engaged in. This is shown by sections 991, 992, and 993 of Shannon's Code, above set out. It has further been disclosed that the Supreme Court of Tennessee in the case of *Butler vs. State*, 1 Shannon's cases, *supra*, has held that such a business cannot be engaged in at any place other than that named in the license.

(3.) Now, it is insisted that this business or occupation of the plaintiff in error, mentioned, designated, and provided for in this act assailed, is located at Chattanooga; its liquors are stored there; its office is kept there; from this place orders for liquors to be shipped into and delivered are issued or sent; the orders for the sale of the goods or liquors are received there; at this place the goods are unpacked, the original packages are broken, and the goods thus become commingled with the balance of the property of the State; at this place the liquors are repacked and prepared for shipment; from this place they are carried by drays or other vehicles to the depots of the various railroads and there delivered to a common carrier. Up to the time of the actual delivery of the liquors to the carrier and receipt of them by the carrier for the consignee they are not articles of interstate commerce. The liquors themselves do not become a part of interstate commerce until actual delivery to the carrier. The above-mentioned things necessary to be done before this delivery to the carrier are not in any sense a part

of interstate commerce transactions, that is, they are not interstate transactions. The difference between the things necessary to be done as conditions precedent to placing any commodity under the control or protection of the interstate commerce clause of the Constitution and interstate commerce itself is clearly pointed out by this court in the following cases:

Coe vs. Errol, 116 U. S., 517; 29 L. Ed., 2017.

Penn. R. R. Co. vs. Knight, 192 U. S., 21; 48 L. Ed., 325.

In the last-mentioned case, in holding that the cab service operated by the Pennsylvania Railroad in connection with its trains was not interstate commerce, although said cabs were operated to carry passengers to and from interstate trains, and also from interstate trains to the final destination of the passenger to his home or hotel, and also from his home or hotel back to an interstate train in starting upon his journey, this court said:

"If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries his traveling trunk from the room to his carriage also so engaged; if the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply grain and hay for the horses also engaged in interstate commerce? And where will the limit be placed?"

So in the instant case we ask, Are the drays used by the plaintiff in error, whether belonging to him or employed from others, in carrying its liquors from its warehouse to the depot engaged in interstate commerce? Are the employees engaged in drawing off the liquors from the barrels into bottles, sealing the same up, and bottling them and repacking them engaged in interstate commerce? Are the bookkeepers, cashiers, and clerks used in keeping the ac-

counts and books of the business engaged in interstate commerce?

It is respectfully submitted that the statements of these queries furnish answers thereto.

(4.) The fact that these liquors when purchased, delivered, and stored are intended by plaintiff in error to be sold only in interstate commerce cannot avail to take from the State this right and authority to either prohibit the sale within its borders *in toto*, to regulate, or to tax the business of selling it as a means of regulation. In discussing a similar case, this court has said:

"We have seen that where a State in the exercise of its undisputed power of local administration can enact a statute prohibiting within its limits the manufacture of intoxicating liquors except for certain purposes, is not any longer an open question before this court. Is that right to be overthrown by the fact that the manufacturer *intends* to export the liquors when made? Does the statute in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export constitute an unauthorized interference with the power given to Congress to regulate commerce? These questions are well answered in the language of the court in the License Tax Cases, 72 U. S., 470; 18 L. Ed., 500."

"Over this commerce and trade (interstate commerce and domestic trade of the State) Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens except as such is strictly incident to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject. The manufacture of intoxicating liquors in a State is none the less a business within that State, because the manufacturer intends, at his convenience, to export such liquors to foreign countries or other States. This court has already decided that the fact that an article was manufactured for export to another State does not 'of itself' make it an

article of interstate commerce within the meaning of section 8, article 1 of the Constitution, and that the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."

Kidd *vs.* Pearson, 128 U. S., 24-5; 32 L. Ed., 351.

It is submitted, therefore, that the right of a State to tax or to prohibit the sale of intoxicating liquors within its borders being undisputed, and that this act being directed to all persons engaged in the sale of intoxicating liquors and not to any particular class of persons or to any person or persons selling to any particular class of trade or customers, that the intention or purpose of the party so engaging in the business of selling intoxicating liquors cannot destroy this right of the State or impair it; that, therefore, the intention and purpose of the plaintiff in error to sell alone to non-residents of Tennessee upon mail orders, the acceptance of which are expressed by the delivery of the liquors to the carrier, can in nowise interfere with the police power of the State to place the business of selling intoxicating liquors generally under a license and prohibiting any one from so engaging without such license and to fix a price therefor.

It is true that the plaintiff in error, in its bill, states that it has sold no liquors within the State. It is true that it asserts that it has not sold liquors for mechanical, scientific, or medicinal purposes. It is likewise true that it asserts that it is not its intention or purpose so to sell in the future, but in this case, as in the case of *Logan vs. Brown*, *supra*, there is no assurance or guarantee that it will continue to sell alone in the manner and to the persons as described in its bill beyond its mere statement.

In dealing with this branch of the subject, the Supreme Court in the *Logan vs. Brown* case, said:

"If we concede, however, that it is intended to be said that complainant has never made sales to par-

ties within the State, still there is no guaranty that he will continue so to exclude such parties from buying hereafter. He has his house in Tennessee, his liquors in Tennessee, his equipment and location, and is prepared to make sales in Tennessee. He is entitled, under the law, to sell his liquor for medicinal, mechanical, scientific, culinary, and all other purposes, save for beverage purposes alone."

It may be further added to this declaration of the Supreme Court of Tennessee that its purpose to sell alone to parties outside of the State in the manner described can in no wise affect its right under this act to sell for any one of the purposes mentioned, because it has a legal right to do so. The intention and purpose of the plaintiff in error to sell alone to non-residents in the manner described can neither broaden nor narrow the scope of this act creating the business a privilege and imposing the tax. The fact that it sells alone to non-residents and in the manner described can neither broaden nor narrow the scope, purpose, and effect of this statute. The statute is directed at, and the tax is imposed upon, the business of a liquor dealer without regard to whom the liquors are sold or the places of residence of the persons.

VIII.

The Act Construed.

That the foregoing positions correctly interpret the scope of this act, its meaning, its purpose, its effect, and its applicability to the plaintiff in error is disclosed by an examination of it along with said code provisions cited.

By section 991 the right to sell intoxicating liquors is declared to be a taxable privilege in the sense of the 28th section of article 2 of the Constitution of Tennessee quoted.

By section 992 this privilege and right shall not be exercised by any person without a license from the clerk of the county court in the county where the liquors are to be sold.

By the second section of the chapter 479 the imposition of a privilege tax upon the business or occupation of a wholesale liquor dealer and fixing the price of said privilege does not operate as a repeal of said sections 991 and 992, because said section provides:

"Nor shall this act be construed as repealing any special act heretofore passed imposing a privilege tax."

The courts of Tennessee, and especially in the case of *Austin vs. Shelton*, *supra*, have recognized this fact, that is, that chapter 479 does not repeal said code sections previously passed. These two sections, 991 and 992, were passed in 1881, before there was any agitation whatever upon the liquor subject in Tennessee and when it was sold legally in every county in the State. Construing the two code sections and said chapter 479 in *pari materia* and also in the light of the construction placed upon them by the Tennessee court in *Austin vs. Shelton* and *Logan vs. Brown* cases, it is clear and beyond doubt that the privilege and right is granted to all persons who pay therefor, regardless of whether the sales are made in or out of Tennessee and also regardless of whether the purchasers reside within or without the State. It is therefore a privilege upon the general business of a wholesale liquor dealer. That is, it is a general and not a special act, applying to all persons alike.

The fourth section of chapter 479 provides:

"That each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the county court clerk, as provided by law for the collection of revenue."

Then follows the heading of "*Liquor Dealers*."

The act then provides that—

"Liquor dealers are defined as every person, company, or firm selling spirituous, vinous, or malt

liquors, beer or ale, or intoxicating bitters, or any medicated and adulterated cider, or any social club or association, incorporated or otherwise, which handles such liquors for sale."

It is submitted that this language but strengthens the idea that the right to engage in the business, occupation, or vocation of selling intoxicating liquors is, under the laws of Tennessee, created a privilege and, as such, taxed. That this privilege has been granted to those who pay the price therefor, without regard to the parties to whom the sales are made or the residences of such parties.

The sixteenth section of this act is in this language:

"That it is hereby declared a misdemeanor for exercising any of the foregoing privileges without first paying the taxes prescribed for the exercise of the same, and all parties so offending shall be liable to a fine of not less than \$10 nor more than \$50 for each day such privilege is exercised without license; but this inhibition shall not apply to any person, firm, or corporation engaged in interstate commerce."

The last line and a half of this section, to wit: "But this inhibition shall not apply to any person, firm, or corporation engaged in interstate commerce," is seized upon and sought to be so construed as to exempt the plaintiff in error under the facts alleged in its bill from the purview of the act. It is evident that this last-quoted language applies alone to the inhibition of said section 16 and more particularly that it applies alone to the fine imposed thereon. It is perfectly apparent that the legislature was of the opinion that the imposition of a fine upon one engaged in interstate commerce would be a burden upon such interstate commerce within the rules laid down by this court. This section 16, and particularly this last line and a half, was incorporated in this act, not because the privilege tax provided for for liquor dealers did not, under it, apply to those engaged in interstate sales, but because the legislature was of the opinion

that the imposition of a fine for the violation of the act by an interstate dealer would render the whole act obnoxious to the commerce clause of the Constitution under the rules announced by this court.

IX.

Nathan vs. Louisiana, 8 Howard, 80.

This case appears to be more nearly in point than any other cases decided by this court to which access has been had, unless it be that of *Delamater vs. South Dakota*, *supra*.

By the act of the legislature of Louisiana for the year 1842, entitled "An act relative to the revenue of the State," it was provided in the ninth section that each and every money or exchange broker shall hereafter pay an annual tax of \$250 to the State, in lieu of the tax heretofore imposed on them." Nathan had failed to pay this tax for two years, and suit was brought in the State court, in which a judgment for \$500.00 was rendered. This was affirmed by the Supreme Court of the State and also by this court.

The defense made was that the sole business of Nathan was buying and selling foreign bills of exchange, which are instruments of commerce, and that the tax is repugnant to the constitutional power of Congress "to regulate commerce with foreign nations and among the several States." This court said:

"Under the law, every person is free to buy or sell bills of exchange, as may be necessary in his business transactions; but he is required to pay the tax if he engage in the business of a money or an exchange broker.

"The right of a State to tax its own citizens for the prosecution of any particular business or profession within the State, has not been doubted. And we find that, in every State, money or exchange brokers, venders of merchandise of our own or foreign manufacture, retailers of ardent spirits, tavern keepers,

auctioneers, those who practice the learned professions, and every description of property, not exempted by law, are taxed.

"As an exchange broker, the defendant had a right to deal in every description of paper and in every kind of money, but it seems his business was limited to foreign bills of exchange. Money is admitted to be an instrument of commerce, and so is a bill of exchange; and, upon this ground, it is insisted that a tax upon an exchange broker is a tax upon the instruments of commerce.

"What is there in the products of agriculture, of mechanical ingenuity, of manufactures, which may not become the means of commerce? And is the vendor of these products exempted from State taxation, because they may be thus used? Is a tax upon a ship, as property, which is admitted to be an instrument of commerce, prohibited to a State? May it not tax the business of shipbuilding, the same as the exercise of any other mechanical art; and also the traffic of ship-chandlers and others, who furnish the cargo of the ship and the necessary supplies? There can be but one answer to these questions. No one can claim an exemption from a general tax on his business within the State on the ground that the products sold may be used in commerce.

"No State can tax an export or an import as such, except under the limitations of the Constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the State, it is a subject of taxation by the State. A cotton broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation."

Now when these liquors of plaintiff in error are shipped in to it and received in its warehouse, they cease to be articles of import even in the original packages. They do not become articles of export until they are actually in the possession and under the care of an interstate carrier on their interstate journey. The thing which this statute declares a privilege is the business of storing, and handling, and

dealing with these liquors while within the borders of Tennessee and while the same are neither exports nor imports, and without regard to whom the sale or sales of same are made or where the purchaser or purchasers thereof reside. So construed, the act is not in conflict with the commerce clause of the Federal Constitution.

State vs. Applegarth, 28 L. R. A. (O. S.), 813.

This case, decided in 1895 by the Maryland Court of Appeals, is perhaps more nearly in point than any case yet dealt with. By an act of the legislature of Maryland it was required of every person, firm, or corporation engaged in the business of packing or canning oysters for sale or transportation, to take out, on or before the first day of September of each year, a license to engage in such business, by application to the clerk of the county court of the county in which the place of business of such applicant is situated, or to the clerk of the Court of Common Pleas, if in Baltimore city.

The applicant was required to state the number of bushels of oysters which he proposed to pack during the succeeding eight months, and to pay at the time of issuing the license the sum of \$25 for such license, and in addition thereto the sum of \$1 per thousand for every thousand bushels over ten thousand so estimated in his application as the total number to be packed during the season. Or, he could pay \$300 for the privilege at the date of the issuance of such license without making other report or estimate of the quantities of oysters packed and shipped during the year. Applegarth was indicted for a violation of this law. The act was assailed upon many grounds. The Maryland court said, after considering the various objections urged by the learned counsel for appellee to this law:

"We are of opinion that, treating it as a tax on the occupation of these persons, the law is not obnoxious to any of the provisions of our State constitution, and therefore must be sustained, unless it

be in conflict with the Federal Constitution, which we will briefly refer to. We do not see how there can be any serious question about the validity of this law, so far as affected by the Constitution of the United States. The law does not in any way discriminate in favor of the citizens of this State against the citizens of other States. On the contrary, it only applies to those whose places of business are in this State. Nor do we think that it can be said that it in any way regulates or undertakes to regulate interstate commerce. It was suggested in argument that, as the law applied to those engaged in packing or canning oysters for sale or transportation, the latter clause made the law objectionable. That term was evidently used to exempt those who packed or canned oysters for their own purposes, but not for sale or transportation. Of course, oyster packers in this State may sell or transport all their oysters within the State, or they may sell or transport some of them beyond the State. But that does not prohibit the State from taxing them for the prosecution of their business within the State."

The Maryland court then quotes the above language set out from the case of *Nathan vs. Louisiana*, *supra*.

The court then concludes:

"Although it is sometimes difficult to draw the line between what is and what is not a regulation of commerce among the States, we have been referred to no case, and know of none, decided by the Federal courts, that will bring this case within any of those classes that have been held to be in conflict with the Constitution of the United States."

If there is power and authority in the legislature of Maryland to place a privilege tax upon the occupation or business of all those engaged in the gathering, canning, and shipping of oysters, without regard to whether the oysters are sold and shipped to parties within or without the State, then it is clear that this statute was within the police power of the State, and that it is not violative of the commerce clause of the Constitution.

X.

Conclusion.

In conclusion it is respectfully submitted:

(1) That this is not a case, as was the Moran case, of a State attempting to exact an additional tax from an occupation which could be carried on solely under authority of Federal license—that is, the operation of a boat engaged in the coastwise commerce of the country.

(2) That it is not a case such as the Covington Bridge Company *vs.* Kentucky, *supra*, where a State seeks to regulate tolls and charges for interstate traffic over a bridge spanning a river and connecting two States without the sanction of either Congress or the legislature of the sister State.

(3) It is not a case such as the Robbins case, *supra*, and the other cases dealt with by the plaintiff in error following the same rule, wherein a State seeks to impose a tax for soliciting orders in another State belonging to non-resident principals or owners, which articles come under the general rule for the regulation of commerce and not under a special rule regulating commerce in liquors provided by the Wilson act.

(4) But that it is a case wherein the State seeks merely to create as a privilege the business conducted within her borders in respect of property, all of which is within her borders, and which is a part of the common mass of the property of the State, and which property also is subject, in its relation to interstate commerce, to the special rules and regulations prescribed by Congress.

(5) It is further insisted that the intention or purpose of the plaintiff in error, as the owner of this property and the proprietor of this business, to sell the property only to non-residents of the State upon mail orders, and to manifest its acceptance of such mail orders and conclude each sale by the act of delivery of the liquors to a common carrier

to be transported out of the State, cannot avail to extend or contract the scope and purpose of this act, which, upon its face, is not in conflict with the commerce clause of the Constitution so as to render it obnoxious thereto. That the purpose of the plaintiff in error to so sell is a matter of his own selection. That the legislature was not required, in the passage of its laws and this law, to look to these purposes and intentions when it created this privilege and fixed the price therefor. That the fact that it sells only in the manner and under the conditions described in its bill is immaterial in construing and passing upon the validity of this general statute, applicable to all dealers in liquors, because the act was not directed at the sale or sales to non-residents or to any other class of purchasers, but that it was directed at and imposed upon the avocation or business of selling intoxicating liquors at wholesale.

(6) These propositions being, as the State of Tennessee insists on behalf of defendants in error, sound, this statute must be sustained; the opinion and decree of the Tennessee Supreme Court affirmed; the writ of error discharged; the injunction dissolved, and the bill dismissed.

Respectfully submitted,

FRANK M. THOMPSON,
Attorney General.

JAN 13 1901
MAY 6 1901

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1900

No. 191

PAUL HEYMAN ET AL. PLAINTIFFS IN ERROR

W. P. HAYS, COUNTY CLERK, CLERK, ET AL.

AND

No. 192

SOUTHERN OPERATING COMPANY ET AL.
PLAINTIFFS IN ERROR

W. P. HAYS, COUNTY CLERK, CLERK, ET AL.

SUPPLEMENTAL AND REPLY BRIEF OF APPEAL OF
DEFENDANTS IN ERROR

FRANK M. THOMPSON

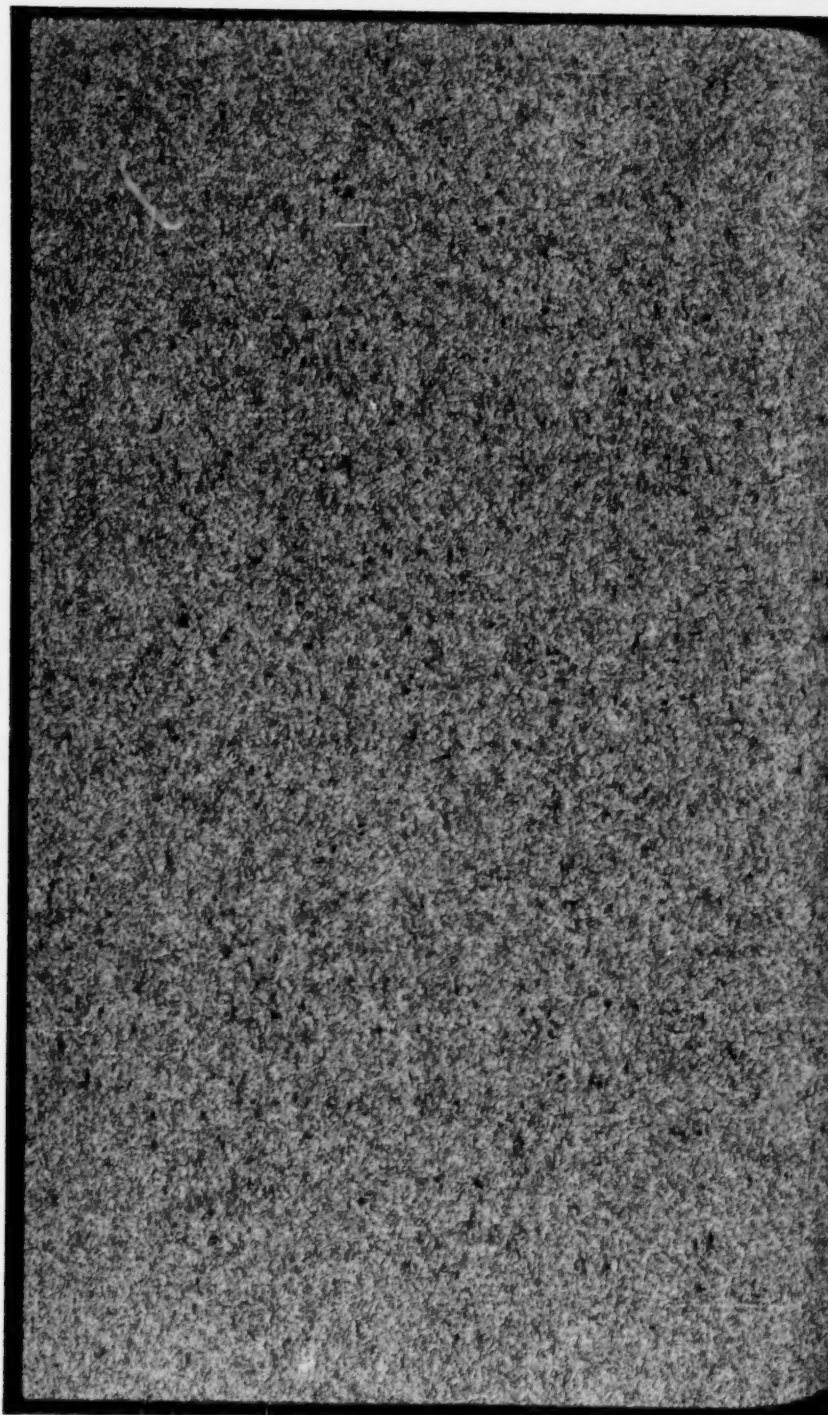
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SUBJECT INDEX.

	Page
Nature of Complainants' Business.....	2
Complainants' contention.....	2
Their method of doing business.....	2
Their sales made in Tennessee.....	3
Discussion of Authorities Cited by Complainants.....	6
Complainants' Authorities Distinguished.....	11
Effect of Federal License.....	19
Summary of Defendants' Contentions.....	19
1. Complainants' sales do not involve interstate commerce.....	19
2. If at all, only incidentally.....	20
3. Complainants within the act involved.....	23
Conclusion	25

TABLE OF CASES.

Asher vs. Texas, 128 U. S., 129.....	6
Baltic Mining Co. vs. Massachusetts, 231 U. S., 68.....	13
Brennan vs. Titusville, 153 U. S., 289.....	6
Browning vs. Waycross, 233 U. S., 16.....	20
Cargill vs. Minnesota, 180 U. S., 452.....	21
Covington Bridge Co. vs. Kentucky, 154 U. S., 205.....	9
Crenshaw vs. Arkansas, 227 U. S., 389.....	6
Crutcher vs. Kentucky, 141 U. S., 47.....	7
Dozier vs. Alabama, 218 U. S. 123.....	6
Emert vs. Missouri, 156 U. S., 296.....	20
Ficklen vs. Taxing District, 145 U. S., 1.....	19
First National Bank vs. Ayers, 160 U. S., 660.....	23
First National Bank vs. Chehalis, 166 U. S., 440.....	23
Gloucester Ferry Co. vs. Pennsylvania, 114 U. S. 204.....	9
Hooper vs. California, 155 U. S., 648.....	16
Hopkins vs. United States, 171 U. S., 578.....	16
Howe Machine Co. vs. Gage, 100 U. S., 676.....	20
Leloup vs. Mobile, 127 U. S., 640.....	7
Logan vs. Brown, 125 Tenn., 209.....	5
Louisville & N. R. Co. vs. Kentucky, 183 U. S., 503.....	12
McCall vs. California, 136 U. S., 104.....	7
Moran vs. New Orleans, 112 U. S., 69.....	9

	Page.
Munn vs. Illinois, 94 U. S., 113.....	14
Nathan vs. Louisiana, 8 Howard, 80.....	21
New York, L. E. & W. R. Co. vs. Pennsylvania, 158 U. S., 431...	12
Nobles vs. Georgia, 168 U. S., 398.....	23
Oakes vs. Mase, 165 U. S., 363.....	23
Osborne vs. Mobile, 16 Wall., 479.....	8
Pennsylvania Ry. Co. vs. Knight, 192 U. S., 21.....	21
Pickard vs. Pullman P. C. Co., 117 U. S., 34.....	8
Robbins vs. Taxing District, 120 U. S., 489.....	6
State vs. Kelly, 123 Tenn., 556.....	3
Stockard vs. Morgan, 185 U. S., 30.....	6
United States vs. Andrews, 207 U. S., 229.....	3
Wiggins Ferry Co. vs. East St. Louis, 107 U. S., 368.....	21
Williams vs. Fears, 179 U. S., 270.....	15
Woodruff vs. Parham, 8 Wall., 123.....	21

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 121.

PAUL HEYMAN ET AL., PLAINTIFFS IN ERROR,

vs.

W. P. HAYS, COUNTY COURT CLERK, ET AL.,

AND

No. 122.

SOUTHERN OPERATING COMPANY ET AL.,
PLAINTIFFS IN ERROR,

vs.

W. P. HAYS, COUNTY COURT CLERK, ET AL.

**SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF
DEFENDANTS IN ERROR.**

At the time the original briefs on behalf of defendants in error in the above cases were prepared the briefs on behalf of the plaintiffs in error had not been filed or submitted; and

counsel for the defendants in error desire to submit the following reply, in addition to what has been said in their original briefs, to the argument for the plaintiffs in error. In this brief the plaintiffs in error are referred to as the complainants and defendants in error as the defendants.

As the discussion herein applies equally to both cases, counsel respectfully ask leave to file the same brief in each of the two cases.

I.

NATURE OF COMPLAINANTS' BUSINESS.

(a) *Complainants' contention.*

That the stocks of goods dealt in by the complainants, being located in the State of Tennessee, were subject to taxation there is conceded, and complainants have paid without objection the ad valorem taxes levied on them. That a State may lawfully impose a privilege tax on the occupation of selling merchandise within its territorial jurisdiction will also not be denied as a general proposition. The contention of the complainants in these cases is, however, that they, although residing and doing business in the State of Tennessee, and dealing in merchandise located therein, are not subject to taxation on their occupation as merchants, because they confine their business to selling on mail orders to those who are residents of other States.

(b) *Their method of doing business.*

The complainants' statement of their method of doing business is that they keep their stocks of liquors in their warehouses in Chattanooga, Tennessee; that they solicit and receive orders by mail from residents of other States for shipment to and delivery in such other States, but neither solicit orders in Tennessee nor solicit or receive orders for shipment

and delivery at any points in Tennessee; that the orders received by them from residents of other States are filled by the delivery of the goods ordered from complainants' place of business in Chattanooga to railroads engaged in interstate traffic for continuous transportation to and delivery at points outside of the State, "which said act of delivery closes the contract of sale"; and that the purchase price of the liquor so sold is paid by checks or money orders, mailed by the non-resident purchasers from the places where they reside to the complainants in Chattanooga. The complainants aver that because of certain adverse legislation in Tennessee it is not profitable for them to sell in that State, and that they have not sold any liquors in Tennessee, except in the manner hereinbefore stated, since January 1, 1912, and that they do not desire or intend to sell any liquors in Tennessee. Their contention is, therefore, that they are engaged exclusively in interstate commerce, and that the tax in question is a burden on and an attempt to regulate such commerce, and violates the commerce clause of the Constitution.

(c) *Their sales made in Tennessee.*

It will be observed that, according to the allegations of the bills, the contracts of sale are *actually made* in the State of Tennessee, it being averred that the complainants manifest their acceptance of the orders received by them by delivering the liquors ordered from their places of business in Chattanooga to the railroads over which the same are to be transported to the purchasers and that such delivery closes their contracts of sale. It must also be borne in mind that ordinarily a delivery of goods by the seller to a common carrier consigned to the purchaser is a delivery to the purchaser, whose agent the carrier is held to be.

35 Cyc., S. & P., pp. 193-194, and cases cited.

United States vs. Andrews, 207 U. S., 229, 240.

State vs. Kelly, 123 Tenn., 556, 562-564.

There is nothing in complainants' methods of selling, as set forth in the bills, to take their transactions out of the ordinary rule, and, therefore, not only are the contracts made in Chattanooga, but the goods sold are actually delivered there to the purchasers; and the interstate transportation occurs after the sales are made and the goods sold are delivered to the purchasers.

It is true that in *State vs. Kelly, supra*, the Supreme Court of Tennessee held that sales made in the manner in which complainants in these cases aver they made their sales were not in violation of a certain criminal statute of the State of Tennessee, for the reason that the delivery to the carrier of the goods sold—by which delivery the court said that the title passed to the purchaser, “the carrier in such cases being treated as the agent of the person making the order”—places the goods under the protection of the interstate commerce clause of the Federal Constitution, since “upon the reception of the goods by the railway company for the purpose of transportation to the foreign State the initial step in that transportation was begun,” and “to hold that the defendants became liable to criminal prosecution for so acting would be equivalent to holding that, although the act performed by them was of a kind sanctioned by the Federal Constitution, yet they were not personally entitled to protection thereunder, and this would be of itself a violation by the court of that Constitution” (123 Tenn., 565).

The statute which the court had under consideration in that case was one which declared it unlawful “to sell or tipple intoxicating liquors * * * as a beverage, within four miles of any school-house * * * in this State.” The court held, in the language above quoted, that to construe this statute to apply to a sale by the terms of which the goods sold were delivered to a carrier to be transported out of the State would violate the constitutional right of the seller to engage in interstate commerce.

The statute in question was manifestly intended to pre-

vent the drinking of intoxicating liquors in the State of Tennessee; for if they were simply sold and not consumed no harm would be done and there would be no reason for the law. It would seem clear, therefore, that a sale by which the goods were to be shipped *out of* the State and were not to be *consumed in it* would not be within the spirit of the law, and would not involve the evil which the law was intended to prevent; and as a criminal law must be construed strictly, and administered according to its spirit and purpose, and not according to its mere letter, the decision above referred to could probably be justified on that ground. Furthermore, it is no doubt true that the legislature of Tennessee could not, by declaring it unlawful to sell intoxicating liquors in the State, prevent the owner of such liquors from selling them in interstate commerce; and in applying a statute of this kind the court would not be disposed to make the defendants' guilt depend on the technical question as to just when the title to the goods sold passed to the purchaser. But to hold that *an owner* of liquors who sells them to a resident of another State, to whom they are to be shipped in interstate commerce, is not guilty of violating a law which makes it a misdemeanor to sell liquors in the State of Tennessee is one proposition; and to say that a person who *engages in the business* of keeping a stock of liquors for sale in the State of Tennessee, and who closes his contracts and makes deliveries to the purchasers in the State, is not subject to taxation on his occupation because of the commerce clause of the Constitution, is another and entirely different one. Evidently the Supreme Court of Tennessee thought the two propositions independent of each other, since they sustained the first in *State vs. Kelly*, and denied the second in the later case of *Logan vs. Brown*.

And, finally, it is, of course, true that this court is not bound or precluded by any expression of opinion by the Supreme Court of Tennessee as to whether a particular transaction constitutes *interstate* or *intrastate* business.

II.

DISCUSSION OF AUTHORITIES CITED BY COMPLAINANTS.

None of the authorities cited and relied on for the complainants involve such a state of facts as these cases present, nor do any of them, as we submit, determine the question at issue here. Since it is conceded that the merchandise of the complainants was subject to taxation in Tennessee, the proposition that the States cannot tax property which is actually in interstate transportation, or before it has become a part of the general property of the State, is not involved; and if it were, in view of the provisions of the Wilson Act, and the fact that the merchandise in which complainants were dealing was intoxicating liquors which had been delivered to the original consignees, the proposition would be immaterial. Neither do these cases present the question of the right of the State to tax a mere broker or selling agent, representing only non-resident principals, and selling articles not in the State in which the sales are made, but which by the terms of the contracts are to be shipped from one State into another, as in *Crenshaw vs. Arkansas*, 227 U. S., 389; *Dozier vs. Alabama*, 218 U. S., 123; *Stockard vs. Morgan*, 185 U. S., 30; *Brennan vs. Titusville*, 153 U. S., 289; *Asher vs. Texas*, 128 U. S., 129; *Robbins vs. Tazewell District*, 120 U. S., 489, and other cases. The principle of those cases is that neither the seller of the articles, living in another State and doing no business in the State in which the tax is levied except to solicit orders for his goods, nor the soliciting or sales agent, who is a mere instrumentality in the interstate transaction, can lawfully be taxed with respect to such sales, because such a tax would be a direct burden upon and interference with interstate commerce. In this case the complainants are not brokers or sales agents, but are themselves the owners of the

goods they sell, and the goods when sold are located in the State of Tennessee and are sold there, and they do not become the subjects of interstate commerce at all until after they are sold and delivered to the purchasers. And it is hardly necessary to call the attention of this court to the fact that in the cases cited the operation of the rule announced has been carefully limited to cases in which the property sold was at the time of the sales in a State other than that in which the sales were made, and that in *Emert vs. Missouri*, 156 U. S., 296, and other cases, this court has held that where the person making the sale, although he is merely the agent of the non-resident owner of the goods, carries the goods which he sells around with him and delivers them to the purchasers, he can lawfully be required to pay a privilege tax. And in the *Crenshaw* case (p. 400) this court distinguishes the *Emert* case on the ground that in it "there was no movement of goods in interstate commerce because of orders taken for their sale, and the specific articles carried about by the peddler and none other were sold and delivered by him."

And in *Stockard vs. Morgan* the court based the decision on the ground that the complainants therein represented only "certain specific parties, firms or corporations, all of whom were non-residents of Tennessee" and "did no business for a general public" (p. 35).

These cases decide nothing more than that a mere selling agent, acting as the intermediary in effecting sales between the owner of property residing in one State and the purchaser residing in another, and where the contract involves property which is at the time in another State and is to be shipped into the State in which the purchaser resides, is a mere instrumentality of interstate commerce, and that to permit the State in which he makes his sales to tax him in respect of the sales so made would burden and interfere with commerce.

In *Crutcher vs. Kentucky*, 141 U. S., 47; *Leloup vs. Port of Mobile*, 127 U. S., 640; *McCall vs. California*, 136 U. S.,

104, and kindred cases, it was held that a license or privilege tax levied by a State on a telegraph company, express company or railroad company engaged in interstate commerce, or a local agent of such companies, is a regulation of and interference with interstate commerce, and, therefore, invalid, the party so taxed being a mere cog in the machine by which the interstate business is transacted, and a tax on him being a tax on the machine itself. It is interesting in this connection to note that in *Osborne vs. Mobile*, 16 Wall., 479, this court, speaking through Chief Justice Chase, held that a tax levied by the city of Mobile on "every express company or railroad company doing business in that city and having a business extending beyond the limits of the State" was not in conflict with the commerce clause of the Constitution. The court said:

"The license tax in the present case was upon a business carried on within the city of Mobile. The business licensed included transportation beyond the limits of the State, or rather the making of contracts, within the State, for such transportation beyond it. It was with reference to this feature of the business that the tax was, in part, imposed; but it was no more a tax upon interstate commerce than a general tax on drayage would be because the licensed drayman might sometimes be employed in hauling goods to vessels to be transported beyond the limits of the State."

In *Pickard vs. Pullman Palace Car Company*, 117 U. S., 34, 50; 29 L. E., 790, it was held that a tax imposed by the legislature of Tennessee on sleeping-cars not owned by roads upon which they were operated in the State was invalid, in so far as it affected interstate commerce, because the cars were "vehicles of transit" engaged in interstate commerce, and the owner was a non-resident of the State and carried on no business within the State and hence was not subject to its jurisdiction. The court distinguished the *Osborne* case on the ground that "Osborne was a local agent, personally subject

to the taxing jurisdiction of the State as representing his principal, and the tax was on the general business he carried on, and the subject of the taxes was not, as here, the act or interstate transportation."

It is true that in *Leloup vs. Mobile*, 127 U. S., 640, 647, the court says of the *Osborne* case that:

"In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several States."

It may be conceded, therefore, that the *Osborne* case has been overruled by the *Leloup* case and other later decisions of this court, and that it is now settled that a State cannot lawfully levy a license tax on an express company, a railroad company, a telegraph company, or any other instrumentality of interstate commerce, where the effect of the tax would be to impose a burden on such interstate business; but the decision in the *Osborne* case indicates that even with respect to such interstate business the line of demarkation between the State and Federal control is not, or was not originally, very clearly defined.

In *Covington Bridge Company vs. Kentucky*, 154 U. S., 205; *Gloucester Ferry Company vs. Pennsylvania*, 114 U. S., 204, and *Moran vs. New Orleans*, 112 U. S., 69, the question presented was also the right of the State to tax a *direct instrumentality* of interstate commerce. In the *Covington* case the State of Kentucky had undertaken to regulate the tolls and fares to be charged on a bridge spanning the Ohio River between Kentucky and Ohio. The court held that as the bridge could not have been built without the consent of Ohio, as the right claimed by Kentucky to fix the tolls on the bridge in both directions "practically nullifies the corresponding right of Ohio to fix tolls from her own State," and as the attempts of the two States to assert and enforce diverse

and conflicting rights in the bridge might result in great confusion, "Congress, and Congress alone, possesses the requisite power to harmonize such differences and to enact a uniform scale of charges which will be operative in both directions."

In the *Gloucester* case was involved the question of the right of Pennsylvania to tax the capital stock of a ferry company operating boats across the Delaware River between New Jersey and Pennsylvania. The company owned no property in Pennsylvania except a lease of a slip, or dock, at which it landed and received passengers and freight on that side, all of its other property being located in the State of New Jersey. The court said that the only business done by the company in Pennsylvania was the landing and receiving passengers and freight at the wharf in Philadelphia, which was "a necessary incident to—indeed, is a part of—their transportation across the Delaware River from New Jersey," and held that—

"a tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the States involved in such transportation."

In *Moran vs. New Orleans* the tax involved was a license or privilege tax levied by the city of New Orleans on persons owning and running towboats to and from the Gulf of Mexico. The court said the tax was "a charge explicitly made as the price of the privilege of navigating the Mississippi River between New Orleans and the Gulf in the coastwise trade"; that "the sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the State thus seeks to burden with an exaction fixed at its own pleasure the very right to which the plaintiff in error is entitled under, and which he derives from, the Constitution and laws of the United States."

III.

COMPLAINANTS' AUTHORITIES DISTINGUISHED.

The foregoing cases constitute but a very small proportion of the decisions of this court in which it has been held that taxes levied by the authority of the States were in violation of the commerce clause of the Constitution, but they are the authorities on which the complainants rely, and it may be fairly assumed that they are the strongest which could be found by their diligent and able counsel to support their contentions. Not one of them, as we respectfully submit, lends any color to the insistence that the tax involved here is subject to the complaint made of it. In every one of the cases relied on the tax affected directly that which was necessarily and essentially an element in and a part of interstate transportation. The broker or drummer who sells in one State the goods of his non-resident principal, located in and to be transported from another State; the express, railroad, and telegraph companies engaged in the business of interstate carriers; and the bridges and ferries over which transportation from one State to another is effected—are all held in the cases cited to be exempt from the regulation and control of the States, because they are all directly involved in and a part of interstate transportation, and because the taxes complained of were levied on and with relation to their interstate business. But it is a very marked and radical advance on any of these cases, or any decision of this court which we have been able to find, to say that a privilege tax on a merchant, levied by the State in which he is domiciled, where his goods and business are located, and where he makes his sales and deliveries, is a violation of the commerce clause, because the merchant chooses, for reasons satisfactory to himself, to confine his trade to filling mail orders from non-residents of the State. Furthermore, the tax involved here is

not a burden peculiar to complainants' particular methods of doing business at all. The liquor dealer in Chattanooga who sells to the local or domestic trade pays exactly the same privilege tax which is imposed on the complainants, and the non-residents who deal with complainants do not have to pay any more, because of this tax, than those who might purchase in Chattanooga direct from the warehouse or stores. Therefore, the tax is not imposed on or because of the particular character of business done by complainants, but it is imposed on the privilege of keeping and selling their stocks of liquors in Chattanooga and maintaining their places of business, with all the facilities and instrumentalities appropriate for storing, packing, and shipping their goods, transporting them from the railroad depots to the stores when received and from the stores to the depots when sold and shipped out, and for conducting their correspondence and banking business. If the tax *affects or operates on* interstate business, it is not because it is *directly imposed on* such business, but because the complainants deem it to their interest to sell only in the manner described in their bills. In other words, if the tax affects interstate commerce at all it is not *directly*, but only *remotely and incidentally*; and the fact that interstate commerce may be indirectly burdened or affected by a tax does not render the tax objectionable.

"The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance."

N. Y., L. E. & W. R. Co. vs. Pennsylvania,
158 U. S., 431, 439.

Also see:

Louisville & N. R. Co. vs. Kentucky, 183 U. S.,
503, 518.

A merchant is not an *instrument* of interstate commerce. He may *engage in* interstate commerce, and while so engaged the States may not tax either the goods actually in transit

or any of the instrumentalities used in the interstate transportation, or levy any other tax *based on the fact of interstate business*. But it is conceded by plaintiff in error that the State may tax the goods in the hands of the local merchant, although he may intend to deal with them exclusively in interstate business; and on the same principle it would seem that the State might tax him for the privilege of following the occupation of a merchant, and enjoying the protection of the State laws, as such, although the goods when sold may be shipped into another State.

In the late case of *Baltic Mining Co. vs. Massachusetts*, 231 U. S., 68, 82, 83, this court said:

"The mere fact that a corporation is engaged in interstate commerce does not exempt its property from State taxation. *United States Exp. Co. vs. Minnesota*, 223 U. S., 335, 344. It is the commerce itself which must not be burdened by State exactions which interfere with the exclusive Federal authority over it."

And again:

"That the State may impose a tax upon a corporation, foreign or domestic, for the privilege of doing business within its borders, is undoubted; and such has long been the legislative policy of the Commonwealth of Massachusetts. * * * The tax is levied upon the privilege of carrying on business within the State, and not upon property therein, which is otherwise taxed." *Ib.*, pp. 84-85.

And further the court says:

"An examination of the previous decisions in this court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce, or to tax property beyond the jurisdiction of the State. In the cases at bar the business for which the companies are chartered is not, of itself, commerce. True it is that their products

are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce, and are entitled to the protection of the Federal Constitution against laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the Constitution of the United States, and it is not within the authority of a State to tax it by burdensome laws. From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business, quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved." *Ib.*, p. 86.

So in this case most of the things involved in the business of the complainants in Chattanooga are not a part of interstate commerce at all. The keeping of a stock of liquors in Chattanooga for sale is not interstate commerce; in fact, it is admitted that while they are located in Chattanooga they are subject to the taxing power of the State. The unpacking of the stock when received, the acceptance of orders for them, the repacking when sold, the delivery of them to the railroad depots, the maintaining of an office for attending to the business, the keeping of the necessary books and bank accounts, are all local matters not constituting a part of interstate transportation. It is only after sales have been made and the goods have been constructively delivered to the purchasers by delivery to the carriers that the interstate transaction begins.

In *Munn vs. Illinois*, 94 U. S., 113, the court sustained an act of the legislature of Illinois prescribing maximum charges for the storage of grain in warehouses at Chicago and other places in the State. In answer to the contention that the act was a regulation of and interference with interstate com-

merce, because the warehouses were used as a facility for handling interstate shipments, the court said:

"It was very properly said in the case of the State Tax on R. Gross Receipts, 15 Wall., 293; 21 L. Ed., 167, that 'It is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution.' The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done." 94 U. S., p. 135.

In *Williams vs. Fears*, 179 U. S., 270, a tax was levied by the State of Georgia on "emigrant agents," which term as used in the act was defined as "a person engaged in hiring laborers in Georgia to be employed beyond the limits of the State." It was contended that this tax was invalid because an attempt to interfere with interstate commerce. The court said (p. 276):

"The real question is, Does this law amount to a regulation of commerce among the States? To answer that question in the affirmative is to hold that

the emigrant agent is engaged in such commerce, and that this tax is a restriction thereon. * * *

"These agents were engaged in hiring laborers in Georgia to be employed beyond the limits of the State. Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the emigrant agent was engaged in transportation or that the tax on his occupation was levied on transportation."

The court said further, discussing the case of *Hooper vs. California*, 155 U. S., 648:

"Mr. Justice White there adverts to the real distinction on which the general rule and its exceptions are based, 'and which consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States, and would exclude State control over many contracts purely domestic in their nature.'

"The imposition of this tax falls within the distinction stated. These labor contracts were not in themselves subjects of traffic between the States, nor was the business of hiring laborers so immediately connected with interstate transportation or interstate traffic that it could be correctly said that those who followed it were engaged in interstate commerce or that the tax on that occupation constituted a burden on such commerce." *Ib.*, p. 278.

In *Hopkins vs. United States*, 171 U. S., 578, a bill in equity had been filed against the appellants to enjoin them from acting under certain articles of association, by-laws, etc., which they had adopted as members of the Kansas City

Live Stock Exchange, an unincorporated association, on the ground that it constituted an unlawful interference with interstate commerce and was in violation of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." On the question whether the conduct of the defendants involved engaging in interstate commerce the court said:

"The business of defendants is primarily and substantially the buying and selling, in their character as commission merchants, at the stock yards in Kansas City, live stock which has been consigned to some of them for the purpose of sale, and the rendering of an account of the proceeds arising therefrom. The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the State from other States or from the Territories. Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the Kansas City Stock Yards, is not the substantial factor in the case. The character of the business of defendants must, in this case, be determined by the facts occurring at that city.

"If an owner of cattle in Nebraska accompanied them to Kansas City and there personally employed one of these defendants to sell the cattle at the stock yards for him on commission, could it be properly said that such defendant in conducting the sale for his principal was engaged in interstate commerce? Or that an agreement between himself and others not to render such services for less than a certain sum was a contract in restraint of interstate trade or commerce? We think not. On the contrary, we regard the services as collateral to such commerce and in the nature of a local aid or facility provided for the cattle owner toward the accomplishment of his purpose to sell them; and an agreement among those who render the services relating to the terms upon which they

will render them is not a contract in restraint of interstate trade or commerce.

"Is the true character of the transaction altered when the owner, instead of coming from Nebraska with his cattle, sends them by a common carrier consigned to one of the defendants at Kansas City with directions to sell the cattle and render him an account of the proceeds? The services rendered are the same in both instances, only in one case they are rendered under a verbal contract made at Kansas City personally, while in the other they are rendered under written instructions from the owner given in another State. This difference in the manner of making the contract for the services cannot alter the nature of the services themselves. If the person, under the circumstances stated, who makes a sale of the cattle for the owner by virtue of a personal employment at Kansas City, is not engaged in interstate commerce when he makes such a sale, we regard it as clear that he is not so engaged, although he has been employed by means of a written communication from the owner of the cattle in another State."

Suppose in these cases that the non-residents to whom the complainants sold their liquors had come to Chattanooga in person and made their purchases, and then shipped the liquors bought out of Tennessee to their places of residence in other States: it would certainly not be contended that the complainants were engaged in interstate commerce in making such sales. Is the true character of the transaction altered, then, when the purchaser, instead of coming to Chattanooga and buying his liquors in person, orders them through the mail and has them shipped to him? To paraphrase the language of the court above quoted: "If the person who makes a sale of liquors by virtue of a personal interview at Chattanooga is not engaged in interstate commerce when he makes such a sale, we regard it as clear that he is not so engaged, although the sale has been effected by a written communication from the purchaser in another State."

IV.

THE EFFECT OF THE FEDERAL LICENSE.

The bills of the complainants aver that they have complied with all the revenue laws of the United States and have paid the Federal taxes assessed against them as liquor dealers and hold Federal licenses authorizing them to carry on business as such. They, therefore, are authorized by their Federal licenses to sell liquors in *Chattanooga only*, both to residents and non-residents of the State; but their contention is that they cannot be required to pay a privilege tax to the State because they had not made any sales except on mail orders to non-residents between January 1, 1912, and the date of the filing of their bills, and because they do not desire or intend to sell in any other way. It is submitted that the complainants are within the principle of the decision in *Ficklen vs. Taxing District*, 145 U. S., 1, and that having taken out a Federal license which authorized them to sell both to non-residents and residents and to carry on generally the business of selling and dealing in liquors in Chattanooga, they cannot escape liability for the tax levied by the State on their occupation on the ground that they intend to confine themselves to a branch of the business which they contend involves interstate commerce.

V.

SUMMARY OF DEFENDANTS' CONTENTIONS.

It is the contention of the defendants:

1. That in view of the facts already adverted to, that the contracts of sale made by complainants are closed in the State of Tennessee and constructive deliveries to the purchasers are made in that State, the complainants' sales are

not interstate transactions and do not involve interstate commerce except in an indirect and incidental way, and that the cases are controlled by the rule announced in *Howe Machine Company vs. Gage*, 100 U. S., 676; *Emert vs. Missouri*, 156 U. S., 296, and kindred cases.

In *Browning vs. Waycross*, 233 U. S., 16, it was held that the business of erecting lightning rods as the agent of a non-resident manufacturer, on whose behalf the agent had solicited orders for the sale of such rods, and from whom he had received them when shipped into the State on such orders, may be subjected to a license tax without violating the commerce clause of the Constitution, although the contracts under which the rods were shipped bound the seller to erect them at his own expense. The court held that the affixing of the rods to the houses was the carrying on of business of a strictly local character, and that it "was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated."

These cases may be said to present the converse of the situation involved in the *Browning* case: that is, while the tax imposed in that case was on something that was done *after the interstate commerce was terminated*, namely, the erection of the rods which had been previously shipped in interstate commerce, here the tax is imposed on something that is done *before the interstate commerce commences*, namely, the selling of liquors in the State of Tennessee. The controlling principle would seem to be the same: and as it was held immaterial in the *Browning* case that the contracts of sale required the seller to erect the rods at his own expense, so it would be immaterial in this case that the contracts contemplated or required that the seller should ship the liquors, when sold, to the purchasers.

2. If the business carried on by the complainants involves the transaction of interstate commerce by them at all, yet the

State may lawfully require them to pay a privilege tax for the business done in the State of Tennessee under the doctrine of *Nathan vs. Louisiana*, 8 How., 80; *Woodruff vs. Parham*, 8 Wall., 123; *Wiggins Ferry Company vs. East St. Louis*, 107 U. S., 368; *Penn. Ry. Co. vs. Knight*, 192 U. S., 21; *Cargill vs. Minnesota*, 180 U. S., 482, and other similar cases. It is said in *Woodruff vs. Parham*, page 140:

"The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States or to deprive the citizen of other States of any privilege or immunity possessed by citizens of Alabama."

Counsel for complainants contend in their brief in this court that the *Wiggins Ferry Company* case "simply involved a tax on property as such and not on commerce." It is conceded that the tax was not one on commerce, but neither was it a tax on property. It was a *license tax* imposed on "keepers of ferries," and the question involved was whether the tax was a burden on or interference with interstate commerce when it was imposed on a ferry keeper living in the State by which the tax was levied, but who used his ferry-boats in transporting passengers between the State in which he resided and another State, across a navigable river. The court said:

"The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a State expressly grants to an incorporated city, as in this case, the power to license, tax and regulate ferries, the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different

States, and the act by which this exaction is authorized will not be held to be a regulation of commerce." 107 U. S., 374.

This case is clearly distinguishable from *Moran vs. New Orleans*, 112 U. S., 69, in that the tax involved in the latter case was on the privilege of "owning and running tow-boats to and from the Gulf of Mexico," which was a direct burden on "the privilege of navigating the Mississippi River between New Orleans and the Gulf in the coastwise trade," while in the *Wiggins* case the tax was imposed for the privilege of keeping a ferry, located in the State wherein the tax was imposed. The operation of the ferry involved interstate commerce, but the court held that fact did not prevent the right of the local authorities to levy the tax. The case seems directly in point in these cases.

In *Cargill vs. Minnesota*, 180 U. S., 452, the court had under consideration a statute of Minnesota providing that the owners of grain elevators and warehouses of a certain character should procure a license from the State Railroad and Warehouse Commission before receiving, shipping, storing or handling any grain therein. It appeared that the defendant company handled only its own grain in its warehouse; that all grain received in said warehouse had been shipped as defendant's property from the warehouse in car-load lots to points outside the State of Minnesota, and that none of it "had been bargained or sold or delivered to any person or firm or corporation doing business in or a citizen of Minnesota, or shipped or transported to or delivered at any city, village, town, point or place within the boundaries of that State."

The court said (page 470):

"It is also contended that the requirement of a license from the defendant company is inconsistent with the power of Congress to regulate commerce among the States. This view cannot be accepted. The statute puts no obstacle in the way of the pur-

chase by the defendant company of grain in the State, or the shipment out of the State of such grain as it purchased. The license has reference only to the business conducted at an established warehouse in the State, between the defendant and the sellers of grain. We do not perceive that in so doing the State has intrenched upon the domain of the Federal authority, or regulated or sought to regulate interstate commerce. In no real or substantial sense is such commerce obstructed by the requirements of a license."

3. On the question whether the concluding clause of section 16 of the act under consideration relieved complainants from the payment of the tax it is perhaps sufficient to say that the Supreme Court of Tennessee construed the act otherwise and held that complainants were liable for the tax. This construction by the highest tribunal of the State by which the statute was passed will be followed and adopted by this court.

First National Bank vs. Ayres, 160 U. S., 660.

Nobles vs. Georgia, 168 U. S., 398.

Oakes vs. Mase, 165 U. S., 363.

First National Bank vs. Chehalis, 166 U. S., 440.

Cargill vs. Minnesota, 180 U. S., 452.

But further than that, it is submitted that the construction of the Supreme Court of Tennessee was clearly correct. Section 16 of the act provides that persons exercising the privileges declared by the act without paying the taxes prescribed therein shall be guilty of a misdemeanor and subject to a fine; and then adds, "but *this inhibition* shall not apply to any person, firm or corporation engaged in interstate commerce." Manifestly this did not mean that no person, firm or corporation engaged in interstate commerce should be liable for the tax, since that would exonerate every one who did any interstate business, however small; and, moreover, if that had been the intention of the legislature, the proviso

would have been appended to the section which prescribed the tax, and not to the one which merely fixed a penalty for the evasion of it. The purpose of the legislature was clearly to relieve those engaged in interstate commerce from the inhibition contained in section 16, but the proviso itself implies that the tax is applicable to such dealers as well as others. And, of course, if we are correct in the contention that the complainants' methods of selling as described in their bills did not constitute interstate commerce, then they are not within the saving of the proviso in any event.

It is respectfully submitted that the business done by the complainants as described in their bills is essentially the selling of liquors in the State of Tennessee. The manner in which the goods sold are delivered to the purchasers—whether over the counters of the complainants' places of business or to common carriers to be transported to the purchasers in other States—is a mere incident of no importance to the complainants except in so far as it furnishes them a pretext to endeavor to evade the payment of the tax required by the State for the privilege of conducting their business. We have found no decision of this court, or any other, which lends support or color to the proposition that the residents of a State, having their places of business and stocks of goods, with all their attendant instrumentalities and facilities, located within the State and enjoying the protection of its laws and government, can evade the payment of the privilege tax imposed by the laws of the State by confining their business to the acceptance of mail orders on which the goods sold are delivered to common carriers, consigned to the purchasers in other States.

If the contention of the complainants is sound, it would, as applied to the city of Chattanooga, result in a remarkable condition of affairs. Chattanooga is located on the border line between the States of Tennessee and Georgia; and while the city itself is in Tennessee, some of its suburbs and a considerable portion of its tributary territory are in Georgia.

According to the contention of the complainants, the merchant in Chattanooga who sells only to residents of Georgia could not be required to pay a privilege tax either in Tennessee or Georgia, while his neighbor, who sells to residents of Tennessee, or to residents of all States indiscriminately, would be subject to the tax. On the other hand, the merchant across the line in Georgia who might choose to confine his business to selling to residents of Tennessee, would be in like manner beyond the reach of the taxing power both of his own State and of the State of Tennessee, while the Georgia merchant who sold to the residents of his own State would be subject to taxation. The fact that complainants sell on mail orders and deliver the goods sold through common carriers is, as we submit, not important; for if such transactions are interstate commerce, then it would be equally so if the deliveries were made to private messengers to be carried to the purchasers, or to the purchasers in person to be by them carried by wagon or other private conveyance into the States of their residence. In each case the contract of sale is closed in the State where the goods are located and the seller resides; and it is on the privilege of making such contracts in the State and maintaining there the facilities for performing them that the tax is levied.

It is respectfully submitted that the opinions of the Supreme Court of Tennessee in *Logan vs. Brown*, 125 Tenn., 209, and in these cases, in which the *Logan* case is reaffirmed, are sound, and that the decrees of that court in these cases should be affirmed.

FRANK M. THOMPSON,
Attorney-General for Tennessee.
 J. B. SIZER,
Attorney for Defendants in Error.

SIZER, CHAMBLISS & CHAMBLISS,
Of Counsel.

HEYMAN *v.* HAYS, COUNTY CLERK OF HAMIL-
TON COUNTY, TENNESSEE.

ERROR TO THE SUPREME COURT OF THE STATE OF
TENNESSEE.

No. 121. Argued January 14, 1915.—Decided February 23, 1915.

The rulings of this court concerning the operation of the commerce clause of the Federal Constitution rest upon the broad principle of the freedom of commerce between the States, and of the equal right of a citizen of one State to freely contract either to receive merchandise from, or to send merchandise into, another State. *Am. Express Co. v. Iowa*, 196 U. S. 133.

The right to engage in interstate commerce is not the gift of a State; it cannot be regulated or restrained by a State, nor can a State exclude from its limits a corporation engaged in such commerce. *West v. Kansas Natural Gas Co.*, 221 U. S. 229.

The selling of liquor under a strictly mail-order business and the delivery within the State to a carrier for through shipment to another State to fill such orders in interstate commerce, is beyond the control of the State.

236 U. S.

Argument for Defendant in Error.

Substance, and not form, controls in determining whether a particular transaction is one of interstate commerce; and the mere method of delivery is a negligible circumstance if, in substantial effect, the transaction is such under the facts.

The protection against imposition by the State of direct burdens upon the right to do interstate commerce is practical and substantial, and embraces those acts which are necessary to the complete enjoyment of the right protected.

The mere fact that a concern doing a strictly interstate business has goods on hand within the State capable of being used in intrastate commerce, and to which attention is given, does not take the business out of the protection of the commerce clause and allow the State to impose a privilege tax on such concern.

Delivery to a carrier within the State for the sole purpose of through shipment to another State in fulfillment of a previous order from the latter state, is not, in a practical sense, the doing of business within the State so as to subject the business to a privilege tax; and so held as to the privilege tax attempted to be imposed by a county in Tennessee on a concern doing a strictly mail-order business confined to shipments to other States. ✓

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of a privilege tax imposed by state authority on a wholesale liquor business confined exclusively to filling mail orders from points outside the State, are stated in the opinion.

Mr. Carlisle S. Littleton and *Mr. James J. Lynch*, with whom *Mr. Jesse M. Littleton* and *Mr. George D. Lancaster* were on the brief, for plaintiff in error.

Mr. Frank M. Thompson, Attorney General of the State of Tennessee, and *Mr. J. B. Sizer* for defendant in error:

Chapter 479 is not repugnant to the commerce clause of the Federal Constitution.

It should be construed with other constitutional provisions and statutes which are *in pari materia* with it. See Constitution of Tennessee, Art. 1, § 28; Code provisions rendering the business of liquor dealers a privilege; the Four-mile Law, and Manufacturers' bill as construed by

the Supreme Court of the State and the state court decisions construing Chap. 479. *Austin v. Shelton*, 1 Tennessee, 637; *Kelly v. Dwyer*, 75 Tennessee, 18; *Kelly v. State*, 123 Tennessee, 550; *Logan v. Brown*, 1 Tennessee, 209; *Motlow v. State*, 125 Tennessee, 54; *State v. Butler*, 1 Shannon's Cases, 91; *State v. Kelly*, 1 Tennessee, 563.

According to the allegations of the bills, the contracts of sale are actually made in Tennessee, as delivery of goods by the seller to a common carrier consigned to the purchaser is a delivery to the purchaser, whose agent the carrier is. 35 Cyc. 193; *United States v. Andrews*, 20 U. S. 229, 240; *State v. Kelly*, 123 Tennessee, 556, 562.

This court is not bound or precluded by any expression of opinion by the Supreme Court of Tennessee as to whether a particular transaction constitutes interstate or intrastate business. This case does not present the question of the right of the State to tax a mere broker or selling agent, representing only non-resident principals, and selling articles not in the State in which the sales are made, but which by the terms of the contracts are to be shipped from one State into another, as in *Crenshaw v. Arkansas*, 227 U. S. 389; *Dozier v. Alabama*, 218 U. S. 123; *Stockard v. Morgan*, 185 U. S. 30; *Brennan v. Titusville*, 153 U. S. 289; *Asher v. Texas*, 128 U. S. 129; *Robbins v. Taxing District*, 120 U. S. 489, and other cases, and see *Ernest v. Missouri*, 156 U. S. 296.

See also *Crutcher v. Kentucky*, 141 U. S. 47; *Leloup v. Port of Mobile*, 127 U. S. 640; *McCall v. California*, 130 U. S. 104; *Osborne v. Mobile*, 16 Wall. 479; *Pickard v. Pullman Co.*, 117 U. S. 34; *Covington Bridge Co. v. Kentucky*, 154 U. S. 205; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 204, and *Moran v. New Orleans*, 112 U. S. 69, which can all be distinguished, as those cases involved the right of the State to tax a direct instrumentality of interstate commerce or the commerce itself.

236 U. S.

Argument for Defendant in Error.

A privilege tax on a merchant, levied by the State in which he is domiciled, where his goods and business are located, and where he makes his sales and deliveries, is not a violation of the commerce clause, because the merchant chooses, for reasons satisfactory to himself, to confine his trade to filling mail orders from non-residents of the State. If such a tax affects interstate commerce at all it is not directly, but only remotely and incidentally. *N. Y., L. E. & W. R. R. v. Pennsylvania*, 158 U. S. 431, 439; *Louis. & Nash. R. R. v. Kentucky*, 183 U. S. 503, 518; *Howe Machine Co. v. Gage*, 100 U. S. 296; and see *Browning v. Waycross*, 233 U. S. 16.

A merchant is not an instrument of interstate commerce. He may engage in interstate commerce, and while so engaged the States may not tax either the goods actually in transit or any of the instrumentalities used in the interstate transportation, or levy any other tax based on the fact of interstate business. *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 82.

It is only after sales have been made and the goods have been constructively delivered to the purchasers by delivery to the carriers that the interstate transaction begins. *Munn v. Illinois*, 94 U. S. 113; *Williams v. Fears*, 179 U. S. 270; *Hooper v. California*, 155 U. S. 648; *Hopkins v. United States*, 171 U. S. 578.

Complainants having taken out a Federal license which authorized them to sell both to non-residents and residents and to carry on generally the business of selling and dealing in liquors in Chattanooga, cannot escape liability for the tax levied by the State on their occupation on the ground that they intend to confine themselves to a branch of the business which they contend involves interstate commerce. *Ficklen v. Taxing District*, 145 U. S. 1.

If the business carried on by the complainants involves the transaction of interstate commerce by them at all, yet the State may lawfully require them to pay a privilege

tax for the business done in the State. *Nathan v. Louisiana*, 8 How. 80; *Woodruff v. Parham*, 8 Wall. 123; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 368; *Pennsylvania Ry. v. Knight*, 192 U. S. 21; *Cargill v. Minnesota*, 180 U. S. 482.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

As a prelude we give a mere outline of the relevant law of Tennessee. In 1909 the manufacture in the State of "intoxicating liquors for the purpose of sale" was prohibited. All liquors were included except alcohol of stated degree of proof "for chemical, pharmaceutical, medical, and bacteriological purposes." The state court held this act constitutional. *Molloy v. State*, 125 Tennessee, 547. In the same year (1909) the sale of liquors as a beverage was forbidden within four miles of any school house, public or private, whether school was in session or not. This law was held constitutional and it is said in the argument that it was construed as excluding all sale of liquor throughout the State except sales by a druggist under a physician's prescription and sales for mechanical medicinal, sacramental and other like purposes. *Kelly v. State*, 123 Tennessee, 516.

In Tennessee the system of taxation embraces *ad valorem* property taxes, merchants' taxes by a percentage on their capital and privilege taxes for the right to engage in business of a prescribed character. In 1909 a privilege tax was imposed upon wholesale and retail liquor dealers. The prohibitory liquor law (the four-mile law) was held not to embrace a mail order business, that is, orders by mail from other States and the shipment from Tennessee to such other States by carrier, because such business was interstate commerce not within state control. *State v. Kelly*, 123 Tennessee, 556.

236 U. S.

Opinion of the Court.

In 1912 this suit was commenced to enjoin the collection of a county privilege tax for carrying on a wholesale liquor business in 1912 and to recover back the sum of a like tax for the same year which had been collected by the State over protest. It was in substance averred that having on hand in the State a stock of liquors, the complainant firm had found it unprofitable to seek to carry on the business of selling within the State and therefore had prior to that time abstained from all attempts to carry on business in the State by selling any liquor directly or indirectly therein and had confined its activities to a mail order business, that is, the soliciting of orders from persons in other States by mail, the receipt of such orders and the filling of the same by delivering the liquor to a carrier for through transportation out of the State. Averring that such business was purely interstate commerce which the State or county had no right to directly burden, it was alleged that the attempt of the State and county to impose the privilege taxes in question was an unlawful interference with, and a direct burden upon interstate commerce and therefore void. The bill was demurred to as stating no case. The demurrer was overruled and the defendants electing to plead no further, a decree went in favor of the complainants for the repayment of the one tax and enjoining the enforcement of the other. The Supreme Court reversed this judgment and because of the asserted repugnancy of the tax whose validity was thus sustained to the Constitution of the United States, this writ of error was prosecuted.

In *Am. Express Co. v. Iowa*, 196 U. S. 133, 143, referring to previous rulings concerning the operation of the Commerce Clause it was said:

"Those cases rested upon the broad principle of the freedom of commerce between the States and of the right of a citizen of one State to freely contract to receive merchandise from another State, and of the equal right of the

citizen of a State to contract to send merchandise into other States."

And again in *West v. Kansas Natural Gas Co.*, 221 U. S. 229, where the law of a State prohibiting the piping out from the State of natural gas was held to be repugnant to the Commerce Clause, it was observed, page 260:

"At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a State, and that it cannot be regulated or restrained by a State, or that a State cannot exclude from its limits a corporation engaged in such commerce."

Indeed, in the opinion of the court below there was not the slightest intimation of doubt concerning this elementary doctrine nor any suggestion that if the complainant firm did no business in the State and confined its activities exclusively to transactions of interstate commerce there was any power to impose the privilege taxes in controversy. And no doubt was expressed concerning the fact that abstractly and inherently the selling of liquor under a strictly mail order business and the delivery in Tennessee of liquor to a carrier for through shipment to other States to fill such orders was interstate commerce beyond the control of the State, which the court had previously pointed out in *State v. Kelly*, *supra*. But the decision was based upon what was deemed to be the legal result of distinctions arising from the mode in which the complainant carried on its business, which the court pointed out as follows:

"But it appears, also, from the bill, not in express terms but by clear inference from other matters stated, that the complainant has a regularly organized business—a business house and employes, &c.—and that he is conducting the business within the State of Tennessee, although he sells all his goods beyond the State.

"We are of the opinion that the case falls directly within *Logan v. Brown*, decided by this Court last year

236 U. S.

Opinion of the Court.

and reported in 141 S. W. Rep. 751 and 125 Tennessee, and the Federal cases therein referred to and relied on, and that there is no substantial distinction between that case and the present one."

We must look, then, to *Logan v. Brown* to ascertain the implied conditions which were found to constitute a local business done in Tennessee which made the privilege taxes valid, although, as admitted, no liquor was sold in Tennessee but all of it was exclusively sold under mail orders from other States. Without intimating that if here present it would be material, there existed in *Logan v. Brown* an element not found in this case, that is, that the stock of liquor which was held in Tennessee and which was exclusively sold under the mail order system was constantly replenished by the receipt of liquor from other States likewise shipped in as the result of mail orders, and in *Logan v. Brown* the receipt of such goods, the breaking of their bulk and the commingling with the existing stock was found to be a business done in Tennessee independent of the shipping of goods to other States under the mail orders. With such considerations removed from view, carefully analyzing the opinion in *Logan v. Brown* we find that the only grounds held in that case to establish a business done in the State independent of the sale and shipment of the goods out of the State under the mail order system were the following: (1) The existence of the goods in the State held in a warehouse as stock susceptible of being sold in the State if there was a desire to do so and ready to be shipped in the channels of interstate commerce; (2) The care and attention for the purpose of packing or otherwise which must be given to the goods situated in the State to enable the interstate commerce shipment to be made; (3) The receipt in the State from other States of the orders; (4) The clerical force or assistance which was required in the State to keep an account of the shipments as made to other States and the super-

vision in Tennessee which was required to conduct the exclusive business of shipping into other States and of receiving the price resulting from such shipments.

But we are of opinion that although it be conceded that such facts were clearly to be implied from the allegations of the complaint that no sales were directly or indirectly made in the State and that the business was exclusively confined to soliciting mail orders from other States and the delivery to a carrier in fulfillment of such orders, such assumed facts afford no ground for taking the business out of the protection of the Interstate Commerce Clause and thus conferring upon the State authority to impose a tax on the privilege of carrying it on. We reach this conclusion because we are of opinion that giving the fullest effect to the conditions stated they were but the performance of acts accessory to and inhering in the right to make the interstate commerce shipments and therefore to admit the power because of their existence to burden the right to ship in interstate commerce would necessarily be to recognize the authority to directly burden such right. In the nature of things the protection against the imposition of direct burdens upon the right to do interstate commerce, as often pointed out by this court, is not a mere abstraction affording no real protection, but is practical and substantial and embraces those acts which are necessary to the complete enjoyment of the right protected.

In addition to the foregoing considerations upon which, as we have seen, the conclusion in *Logan v. Brown* that local business was done in the State was based, it is now urged in argument by the State that the correctness of such conclusion is in addition demonstrated by the fact that the goods embraced by the orders received from other States were delivered to a carrier in Tennessee, and as such carrier was the agent of the buyer, therefore the sales were completed in Tennessee. But this merely denies the interstate commerce character of the mail order busi-

236 U. S.

Opinion of the Court.

ness. It directly conflicts with the ruling of the state court in *State v. Kelly*, *supra*, and therefore comes to this: That under the law of the State, such business is interstate commerce for the purpose of allowing it to be done, but when done a privilege tax may be exacted for doing it because it is not such commerce. It is no answer to suggest that the *Kelly Case*, while treating the mail order business as not within the prohibition law because it was interstate commerce, really was but an expression of a broad rule of interpretation giving effect to the spirit and intent of the prohibition law, since delivery in the State of liquor to be transported to another State could not be said to be a sale or delivery as a beverage. But if this rule of interpretation were to be here applied, it would destroy the distinction which it is advanced to sustain, for it would lead to the conclusion that the act of delivery for the sole purpose of through shipment to another State in fulfillment of a previous order was in no practical sense the doing of business within the State. But this is immaterial since it is not open to controversy that substance and not form controls in determining whether a particular transaction is one of interstate commerce and hence that the mere method of delivery is a negligible circumstance if in substantial effect the transaction under the facts of a given case is interstate commerce. *Am. Express Co. v. Iowa*, 196 U. S. 133, 144; *Savage v. Jones*, 225 U. S. 501, 520.

Some cases ¹ are pressed in argument as upholding the privilege tax in question under the circumstances here disclosed but they are inapposite. We do not stop to review them in order to sustain this appreciation of the cases relied on since in our opinion in the nature of things its

¹ *Nathan v. Louisiana*, 8 How. 73, 80; *Woodruff v. Parham*, 8 Wall. 123; *Wiggins Ferry v. East St. Louis*, 107 U. S. 365, 368; *Pennsylvania Ry. v. Knight*, 192 U. S. 21; *Cargill v. Minnesota*, 180 U. S. 452.

accuracy is demonstrated by a mere statement of the proposition to which all the contentions here urged are in their essence reducible, which is as follows. Although the shipment of merchandise from one State to another is interstate commerce which the States cannot directly burden, nevertheless the States may directly burden such shipments in every case where there is any merchandise kept in the State to be the subject of interstate commerce shipment or when any of those steps which are essentially prerequisite to the initiation of an interstate commerce shipment are taken by the owner of the merchandise.

Reversed.

SOUTHERN OPERATING COMPANY *v.* HAYS,
COUNTY CLERK OF HAMILTON COUNTY,
TENNESSEE.

ERROR TO THE SUPREME COURT OF THE STATE OF
TENNESSEE.

No. 122. Argued January 14, 1915.—Decided February 23, 1915.

Decided on the authority of *Heyman v. Hays*, *ante*, p. 178.

THE facts are stated in the opinion.

Mr. Carlisle S. Littleton and *Mr. James J. Lynch*, with whom *Mr. Jesse M. Littleton* and *Mr. George D. Lancaster* were on the brief, for plaintiff in error.

Mr. Frank M. Thompson, Attorney General of the State of Tennessee, and *Mr. J. B. Sizer*, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This case was brought to enjoin the collection of a State and County Privilege Tax upon the same facts as those which were involved in the case just decided. The two cases in both the trial and the court below were heard together and they were here argued at the same time. The court below in disposing of this case with one exception placed its conclusion upon the same grounds upon which it decided the previous case. The one exception referred to was a declaration that the trial court erred in granting the injunction so far as the state tax was concerned because there was no authority to enjoin the collection of such a tax and the only right was to pay under protest and sue to recover. Whatever difference between the two cases would otherwise result from that point of view need not be considered since the Attorney General of the State in the argument at bar in express terms states that that question is not insisted upon. It being thus removed from consideration, a complete identity between the two cases results and for the reasons given in the previous case the judgment in this case must also be reversed.

Reversed.